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No. 84-1076

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Appellant,

v.

THE STATE OIL AND GAS BOARD OF MISSISSIPPI and
COASTAL EXPLORATION, INC., *et al.*,
Appellees.

On Appeal from the Supreme Court of Mississippi

BRIEF FOR THE APPELLANT

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QUESTIONS PRESENTED

1. By enacting the Natural Gas Policy Act of 1978 did Congress intend to cede to the states its preemptive jurisdiction over interstate pipelines and their purchase and transportation of natural gas for resale in interstate commerce, thereby overruling *Northern Natural Gas Co.* v. *State Corporation Commission*, 372 U.S. 84 (1963)?

2. Does Mississippi's attempted regulation of interstate pipeline companies' purchase of "high cost" gas constitute an impermissible burden on interstate commerce under present market conditions?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Wiley Fairchild, Rodney Fairchild, W. R. Fairchild Construction Company, Ltd., Getty Oil Company, Inexco Oil Company, and Tomlinson Interests, Inc. are producers who have appeared in opposition to Transcontinental Gas Pipe Line Corp. at all stages of the proceedings.

The following persons personally appeared before the Mississippi State Oil and Gas Board at the initial proceeding: Susan W. Clements Lay, Lane Petroleum Corp., Louis G. Ridgeway, Daniel E. Herlihy, and Bryant M. Allen.

Transcontinental Gas Pipe Line Corporation is a wholly-owned subsidiary of Transco Energy Company. Affiliates of Transcontinental Gas Pipe Line Company are Border Gas, Inc. and NESP Supply Corp.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Background and Overview of the Federal Statutory Scheme over Natural Gas Sold and Transported in Interstate Commerce	3
B. FERC's Assertion of Jurisdiction Over the Purchasing Practices of Transco since the Enactment of the NGPA	14
C. Mississippi's Attempt to Regulate Transco and its Purchases	16
SUMMARY OF THE ARGUMENT	20
I. Preemption by the NGA and NGPA	20
II. The Impermissible Burden and Discrimination Against Interstate Commerce	22
ARGUMENT	23
I. Efforts by Mississippi to Force Transco to "Ratably" Purchase High Cost Gas From Producers with No Contract are Preempted	23
A. The Pervasive Federal Interest in the Interstate Gas Market	24

TABLE OF CONTENTS continued

Page

B. Mississippi's Ratable Purchase Requirement is an Obstacle to the Accomplishment of Congressional Objectives Underlying the Natural Gas Act and NGPA 30

C. The Direct Conflict with Ongoing FERC Regulation of Interstate Pipelines 33

II. Mississippi's Enforcement of Rule 48 Against an Interstate Pipeline Impermissibly Burdens and Discriminates Against Interstate Commerce 34

A. The Applicable Test Under the Commerce Clause 35

B. The "Practical Effect" of Mississippi's Ratable Take Order 38

C. Increases In Total Pipeline Takes from Mississippi Caused by Rule 48 Operate as a Prohibited Discriminaton Against Interstate Commerce 40

D. The Impact of Rule 48 On the Cost of Gas in the Interstate Market Constitutes an Impermissible Burden 43

E. Constitutional Regulatory Alternatives Do Exist 46

CONCLUSION 48

APPENDIX 1a

TABLE OF AUTHORITIES

CASES: Page

Arkansas Electric Cooperative Corp. v. *Arkansas Public Service Commission*, 461 U.S. 375 (1983) . 21, 32, 34

Atchison, Topeka & Santa Fe Railway Co. v. *Public Utilities Commission*, 346 U.S. 346 (1953) 2

Bacchus Imports, Ltd. v. *Dias*, 104 S.Ct. 3049 (1984) . 36, 41

Barnwell, Inc. v. *Sun Oil Co.*, 249 Miss. 398, 162 So.2d 635 (1964) 47

Best & Co. v. *Maxwell*, 311 U.S. 454 (1940) 37

California v. *Southland Royalty Co.*, 436 U.S. 519 1978) 29

Champlin Refining Co. v. *Corporation Commission*, 286 U.S. 210 (1932) 23, 24, 47

Cities Service Gas Co. v. *FERC*, 627 F.2d 1027 (10th Cir. 1980) 45

Cities Service Gas Co. v. *Peerless Oil & Gas Co.*, 340 U.S. 179 (1950) 44, 45

Energy Reserves Group, Inc. v. *Kansas Power & Light Co.*, 459 U.S. 400 (1983) 29, 46, 48

Exxon Corp. v. *Eagerton*, 462 U.S. 176 (1983) .... *passim*

Exxon Corp. v. *Governor of Maryland*, 437 U.S. 117 (1978) 41

Foster-Fountain Packing Co. v. *Haydel*, 278 U.S. 1 (1928) 41

FPC v. *Corporation Commission*, 362 F. Supp. 522 (W.D. Okla. 1973), *aff'd*, 415 U.S. 961 (1974) . 22, 36, 44

FPC v. *East Ohio Gas Co.*, 338 U.S. 464 (1950) 24

FPC v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972) 22, 33, 34

H. P. Hood & Sons v. *Dumond*, 336 U.S. 525 (1949) .. 35

TABLE OF AUTHORITIES continued

Page

Hughes v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976) 37-38

Hughes v. *Oklahoma*, 441 U.S. 322 (1979) 36, 37, 41

Hunt v. *Washington Apple Advertising Commission*, 432 U.S. 333 (1977) 37, 41, 43

Interstate Natural Gas Co. v. *FPC*, 331 U.S. 682 (1947) 24

Kassell v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981) 22, 44

Lewis v. *B. T. Investment Managers, Inc.*, 447 U.S. 27 (1980) 37

Maryland v. *Louisiana*, 451 U.S. 724 (1981) .. 21, 30-31, 33

Missouri v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924) 35

New England Power Co. v. *New Hampshire*, 455 U.S. 331 (1982) 45

Northern Natural Gas Corp. v. *State Corporation Commission*, 372 U.S. 84 (1963) ..... *passim*

Oklahoma v. *FERC*, 494 F. Supp. 636 (W.D. Okla 1980), *aff'd*, 661 F.2d 832 (10th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982) 27

Pennsylvania v. *West Virginia*, 262 U.S. 553 (1923) . *passim*

Philadelphia v. *New Jersey*, 437 U.S. 617 (1978) . 22, 36, 48

Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672 (1954) 4, 24

Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) .. 36, 46, 48

Public Service Commission v. *Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983) 26, 29

Raymond Motor Transportation, Inc. v. *Rice*, 434 U.S. 429 (1978) 44

TABLE OF AUTHORITIES continued

Page

Shell Oil Co. v. *FERC*, 566 F.2d 536 (5th Cir. 1978), *aff'd*, 440 U.S. 1273 (1979) 29

South-Central Timber Development, Inc. v. *Wunnicke*, 104 S.Ct. 2237 (1984) 45, 49

Southern Pacific Co. v. *Arizona*, 325 U.S. 761 (1945) . 43

Sporhase v. *Nebraska*, 458 U.S. 941 (1982) 41, 45

Tenneco, Inc. v. *Sutton*, 530 F. Supp. 411 (M.D. La. 1981) 40

United Gas Pipe Line Co. v. *FPC*, 385 U.S. 83 (1966) 22, 34

West v. *Kansas Natural Gas*, 221 U.S. 229 (1911) .. 40

CONSTITUTION AND STATUTES:

United States Constitution:

Article I, Section 8, clause 3 (Commerce Clause) .. 2, 34, 45-46

Article VI, Section 2 (Supremacy Clause) 2

Natural Gas Act, 15 U.S.C. §§ 717-717w 2

Section 1, 15 U.S.C. § 717 2

Section 1(a), 15 U.S.C. § 717(a) 3

Section 1(b), 15 U.S.C. § 717(b) 3, 34

Section 1(c), 15 U.S.C. § 717(c) 4

Section 2a(6), 15 U.S.C. § 717a(6) 4

Section 4(b), 15 U.S.C. § 717c(b) 2, 4

Section 5(a), 15 U.S.C. § 717d(a) 2, 4

Section 7(b), 15 U.S.C. § 717f(b) 13

Section 7(c), 15 U.S.C. § 717f(c) 34

Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432 2

Sections 101-109, 15 U.S.C. §§ 3311-3319 9

TABLE OF AUTHORITIES continued

	Page
Section 101(b)(9), 15 U.S.C. § 3311(b)(9)	2, 10
Section 105, 15 U.S.C. § 3315	11
Section 106(b), 15 U.S.C. § 3316(b)	11
Section 107(c), 15 U.S.C. § 3317(c)	2
Section 121, 15 U.S.C. § 3331	10
Section 121(a), 15 U.S.C. § 3331(a)	2
Section 121(b), 15 U.S.C. § 3331(b)	2, 10
Section 122, 15 U.S.C. § 3332	2, 10
Section 302, 15 U.S.C. § 3362	12
Section 303, 15 U.S.C. § 3363	12
Section 315, 15 U.S.C. § 3375	2, 13
Section 315(a), 15 U.S.C. § 3375(a)	13
Section 315(b), 15 U.S.C. § 3375(b)	13
Section 501, 15 U.S.C. § 3411	2, 10
Section 503(a)-(d), 15 U.S.C. § 3413(a)-(d)	2
Section 503(b), 15 U.S.C. § 3413(b)	11
Section 503(c), 15 U.S.C. § 3413(c)	29, 46
Section 503(c)(1), 15 U.S.C. § 3413(c)(1)	11
Section 503(c)(3), 15 U.S.C. § 3413(c)(3)	11
Section 505, 15 U.S.C. § 3415	28
Section 505(a)(1), 15 U.S.C. § 3415(a)(1)	12
Section 601, 15 U.S.C. § 3431	2, 12
Section 601(a)(1)(A) or (B), 15 U.S.C. § 3431(a)(1)(A) or (B)	13
Section 602(a), 15 U.S.C. §3432(a)	2, 14, 29, 46
56 Stat. 83 (1942)	4
61 Stat. 459 (1947)	4
68 Stat. 36 (1954)	4
76 Stat. 72 (1962)	4
91 Stat. 4-10 (1977)	5

TABLE OF AUTHORITIES continued

	Page
92 Stat. 3117 (1978)	7
92 Stat. 3174 (1978)	7
92 Stat. 3289 (1978)	7
92 Stat. 3350 (1978)	7
Miss. Code Ann. 53-1-1 (1972 and Supp. 1984)	2, 40, 47
Miss. Code Ann. 53-1-1 to -101 (1972 and Supp. 1984)	17
MISCELLANEOUS:	
18 C.F.R. § 274.401(a)	11
18 C.F.R. Parts 157 and 284	34
123 Cong. Rec. 11482 (1977)	5
124 Cong. Rec. 28633 (1978)	32
124 Cong. Rec. 28661 (1978)	27
124 Cong. Rec. 29101 (1978)	27
124 Cong. Rec. 29108 (1978)	6, 7, 12, 28
124 Cong. Rec. 29116 (1978)	27
124 Cong. Rec. 30021 (1978)	27
124 Cong. Rec. 30028 (1978)	26
124 Cong. Rec. 38350-503 (1978)	7
124 Cong. Rec. 38361 (1978)	9
124 Cong. Rec. 38366 (1978)	28
Energy Information Administration, U.S. Dept. of Energy, *Statistics of Interstate Natural Gas Pipeline Companies,* Table 20 (1983)	39
Energy Information Administration, U.S. Dept. of Energy, *Structure & Trends in Natural Gas Wellhead Contracts* 38 (1983)	38-39

TABLE OF AUTHORITIES continued

Page

42 Fed. Reg. 6789 (1977) 5

42 Fed. Reg. 6791 (1977) 5

42 Fed. Reg. 18053 (1977) 5

44 Fed. Reg. 61950 (1979) 10

48 Fed. Reg. 25264 (1983) 16, 21

49 Fed. Reg. 50637 (1984) 10

50 Fed. Reg. 114 (1985) 16, 34

50 Fed. Reg. 3801 (1985) 16, 34

FPAS NGPA Inf. Serv. § 21, pp. 1-2 11

FPAS NGPA Inf. Serv. § 601:220, pp. 3-4 13

H.R. 4051, 80th Congress, 1st Sess. (1947) 26

H.R. 4099, 80th Congress, 1st Sess. (1947) 26

H.R. 1758, 81st Congress, 1st Sess. (1949) 26

H.R. 6645, 84th Cong., 2nd Sess. (1956) 26

H.R. Rep. No. 709, 75th Cong., 1st Sess. 1-2 (1937) ... 3

H.R. Rep. No. 543, 95th Cong., 1st Sess. (1977) 5, 6, 28

H.R. 8444, 95th Cong., 1st Sess., Part IV (1977) 6

H.R. Rep. 1752, 95th Cong., 2nd Sess. (1978) ..... *passim*

Pierce, *Natural Gas Regulation, Deregulation & Contracts,* 68 Va. L. Rev. 63 (1982) 38-39

S. Rep. No. 1162, 75th Cong., 1st Sess. (1938) 3

S. 1498, 81st Congress, 1st Sess. (1949) 26

S. Rep. No. 436, 95th Cong., 1st Sess. (1977) 6, 28

TABLE OF AUTHORITIES continued

Page

S. Rep. 1125, 95th Cong., 2nd Sess. (1978) 14

S. Conf. Rep. No. 1126, 95th Cong., 2d Sess. (1978) . 29, 46

S. 2104, 95th Cong., 1st Sess. (1977) 6

Statewide Rule 48 of the State Oil and Gas Board of Miss. ..... *passim*

Transcontinental Gas Pipe Line Corporation, 23 FERC ¶ 61292 (1983) 15

Transcontinental Gas Pipe Line Corporation, 14 FERC ¶ 61204 (1981) 14

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BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the Mississippi Supreme Court (J.S. App. A), is reported at 457 So. 2d 1298 (Miss. 1984).[1] The opinion of the Circuit Court of Hinds County, Mississippi (J.S. App. B, 59a-103a) is not reported. The order of the Mississippi State Oil and Gas Board (Board) (J.S. App. C, 104a-113a) is not reported.

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[1] Jurisdictional Statement (J.S.) Appendix A, 1a-58a.

JURISDICTION

This case involves a challenge to the constitutionality of the Board's enforcement of a "ratable take" rule against an interstate pipeline, Transcontinental Gas Pipe Line Corporation (Transco). The Mississippi Supreme Court entered its judgment upholding the challenged regulation and order on September 5, 1984. (J.S. App. E, at 115a). A petition for rehearing was filed by Coastal Exploration, Inc. and was denied on October 5, 1984. (J.S. App. D, at 114a). Transco filed a notice of appeal to this Court on November 30, 1984 (J.S. App. F, at 116a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). *Atchison, Topeka & Santa Fe Railway Co.* v. *Public Utilities Commission*, 346 U.S. 346, 348 (1953). Probable jurisdiction was noted March 25, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2, and the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, are set forth in J.S. App. G, p. 119a.

To some extent, all of the Natural Gas Act (NGA), 15 U.S.C. §§ 717-717w, and the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §§ 3301-3432, are involved in the Supremacy Clause question. Sections 1, 4(b), and 5(a) of the NGA[2] and Sections 101(b)(9), 107(c), 121(a) and (b), 122, 315, 501, 503(a)-(d), 505(a), 601 and 602(a) of the NGPA[3] are reproduced in Appendix A hereto.

Miss. Code Ann. § 53-1-1 (1972) and Statewide Rule 48 of the State Oil and Gas Board of Mississippi are set forth in J.S. App. G, 128-9a.

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[2] 15 U.S.C. §§ 717, 717c(b), 717d(a).

[3] 15 U.S.C. §§ 3311(b)(9), 3317(c), 3331(a) and (b), 3332, 3375, 3411, 3413(a)-(d), 3415(a), 3431, 3432(a).

STATEMENT OF THE CASE

A. Background and Overview of the Federal Statutory Scheme over Natural Gas Sold and Transported in Interstate Commerce.

1. The Natural Gas Act.

To understand the current scheme of federal control over natural gas, one must return to the year 1938 and the enactment of the Natural Gas Act. The NGA was the product of a Congressional decision to protect consumers against exploitation at the hands of "natural gas companies." It was prompted by a perceived regulatory "gap":

> Sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) . . . have been considered not local in character and, even in the absence of Congressional action, not subject to State regulation. The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act.

H. R. Rep. No. 709, 75th Cong., 1st Sess. 1-2 (1937); S. Rep. No. 1162, 75th Cong., 1st Sess. 1-2 (1937).

Section 1(a), 15 U.S.C. § 717(a), sets forth the intent of the Congress in enacting the NGA:

> It is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and sale thereof in interstate and foreign commerce is necessary in the public interest.

Section 1(b), 15 U.S.C. § 717(b), sets forth a clear demarcation between the state and federal regulatory domains. The federal government through its "Commission"[4] would have exclusive control over three areas:

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[4] Federal Power Commission (FPC) or its successor, the Federal Energy Regulatory Commission (FERC).

(1) The transportation of natural gas in interstate commerce;

(2) The sale in interstate commerce of natural gas for resale for ultimate public consumption; and

(3) Natural gas companies[5] engaged in such transportation or sale.

States were left with their traditional jurisdiction over (1) production or gathering of natural gas; (2) local distribution companies and their retail sales of natural gas; and (3) wholly intrastate sales and transportation.[6]

Under Section 4(b) and 5(a), 15 U.S.C. §§ 717c(b) and 717d(a), the Commission is expressly charged with preventing a natural gas company under its jurisdiction from making or granting "any undue preference or advantage to any person or subject[ing] any person to any undue prejudice or disadvantage," or maintaining "any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

2. Congressional Action Leading to the NGPA.

Federal statutory jurisdiction over the natural gas market remained essentially unchanged until 1977[7] when, due to the critical shortage of natural gas in the interstate

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[5] A "natural gas company" is expressly defined in the NGA as a person engaged in the transportation of natural gas in interstate commerce, *or* the sale in interstate commerce of such gas for resale. 15 U.S.C. §717a(6).

[6] Section 1(c), 15 U.S.C. § 717(c), as amended in 1954. 68 Stat. 36 (1954).

[7] There were revisions to the Natural Gas Act in 1942, 1947, 1954 and 1962 which, except as noted in Note 6, *supra*, are not germane to the jurisdictional question presented. 56 Stat. 83 (1942); 61 Stat. 459 (1947); 68 Stat. 36 (1954); 76 Stat. 72 (1962). The debate over federal jurisdiction of independent producer sales to interstate pipelines was settled in 1954. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

market, the Emergency Natural Gas Act of 1977 (ENGA) was passed.[8] This statute provided a two month period in which the President could declare a natural gas emergency and require any interstate pipeline or producer to contract with an interstate pipeline for emergency supplies of natural gas without subjecting those supplies (or the sellers) to regulation under the NGA. President Carter declared a natural gas emergency on February 2, 1977 but, on April 1, 1977, terminated the program.[9]

In April, 1977, President Carter declared "the moral equivalent of war" on the energy crisis that had gripped the nation since 1973 and challenged Congress to pass a comprehensive national energy plan. 123 Cong. Rec. 11482 (1977). The goal of the NGA, to ensure adequate supplies of natural gas nationwide at just and reasonable rates, had not changed. However, Congress recognized that, in order to meet this goal, the bifurcated, interstate/intrastate gas market that had been created by regulation under the NGA had to be eliminated. Further, the regulatory structure for wellhead pricing had to be revised in order to keep pace with market dynamics and allow producers adequate incentives to explore for new supplies of natural gas.[10] *See* H.R.

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[8] Pub. L. 95-2, §§1-14, 91 Stat. 4-10 (1977).

[9] Proclamation No. 4485, 42 Fed. Reg. 6789 (1977); Exec. Order No. 11,969, 42 Fed. Reg. 6791 (1977); Proclamation No. 4495, 42 Fed. Reg. 18053 (1977).

[10] Senator Henry Jackson, quoting from a letter dated September 8, 1978 from Mr. Charles Curtis, the Chairman of FERC, summarized the regulatory problems and causes to the Senate during the debates on the NGPA:

> FERC's current case load is substantial. It's backlog unacceptably large. This circumstance derived from a number of causes. First, the regulatory scheme, as presently implemented, is particularly cumbersome, and appears incapable of keeping pace with the dynamics of the market. Second, this commission's predecessor, the Federal Power Commission, was singularly unsuccessful in obtaining from Congress

Rep. No. 543, 95th Cong., 1st Sess. 136-9 (1977); S. Rep. No. 436, 95th Cong., 1st Sess. 2-4 (1977).

The House of Representatives passed a bill which imposed a permanent, uniform wellhead price policy for all natural gas produced in the United States and an incremental pricing mechanism for pass-through of these price increases to the end-user.[11]

On the other hand, the Senate passed a bill which eliminated federal wellhead price controls on new natural gas in the continental United States within two years, imposed interim ceilings based on the price of No. 2 fuel oil, and continued price controls on flowing interstate gas without any controls on interstate gas.[12]

Both House and Senate versions had created a permanent extension of certain provisions of ENGA[13] and changes to the rate-making authority of the Commission which were designed to reduce the regulatory burden on natural gas producers.[14]

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adequate resources to perform the Commission's duties. Third, the evolution of the various producer-price methodologies, changing from producer-by-producer regulation to area rates, and lastly, to national rates for different gas vintages has created its own set of administrative problems and uncertainty in the marketplace. But perhaps the most difficult aspect which attends the administration of the current regulatory system is grounded in the bimodel character of the market and the limited regulatory reach of the Commission under the Natural Gas Act. These deficiencies place great stress on the regulatory system and add substantially to the administrative and enforcement duties of the Commission.

124 Cong. Rec. 29108 (1978).

[11] H.R. 8444, 95th Cong., 1st Sess., Part IV (1977).

[12] S. 2104, 95th Cong., 1st Sess. (1977).

[13] The House version proposed that ENGA be extended to apply to both interstate and intrastate pipelines. The Senate proposed that it apply only to interstate pipelines. The Senate version was adopted in the NGPA.. H.R. Rep. 1752, 95th Cong., 2d Sess. pp. 103-06 (1978).

[14] *See* H.R. Rep. No. 543, 95th Cong., 1st Sess., 162-64, 166-71 (1977). S. Rep. No. 436, 95th Cong., 1st Sess. 8, 10-14 (1977).

The House and Senate bills were submitted to a joint conference in September, 1977.[15] Over a year later, Congress passed the NGPA as part of its National Energy Act, a package of legislation intended to create a "comprehensive national energy policy."[16] The NGPA was, by far, the most controversial and complex legislation of the package.[17] It was the epitome of compromise between the two completely different programs proposed by the House and the Senate.

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[15] In his discussion of the final committee report, floor leader Henry M. Jackson stated to the Senate:

> Because of the very wide differences in approach between the House and Senate passed natural gas bills, the conferees were faced with a considerable task in attempting to reconcile the two bills. We chose to proceed by developing an outline of a proposed compromise rather than working with statutory language. After we concluded our deliberations, the staff was instructed to draft the conference report and joint statement of managers. On July 30, 1978, the Chairman of the conference, the Honorable Harlee O. Staggers, circulated the staff's draft. That draft was reviewed by Mr. Curtis [Chairman of FERC] and Ms. Hollis, among others. Ms. Hollis and the general counsel of the Commission, Mr. Robert Nordhaus, participated with members of the staff in the further development of the final version of the conference report. It is that final version which has been presented to the Senate for its consideration.

124 Cong. Rec. 29108 (1978).

[16] 124 Cong. Rec. 38350 (October 14, 1978). That package included the Natural Gas Policy Act of 1978, Pub. L. No. 75-621, 92 Stat. 3350, *et seq.;* the Public Utility Regulatory Policy Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117, *et seq.;* the Energy Tax Act of 1978, Pub. L. No. 95-618; 92 Stat. 3174, *et seq.;* and the Power Plant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3289, *et seq.*

[17] The House of Representatives debated and voted on the entire energy package rather than each separate act. Of the members who voiced their reasons for opposition to the National Energy Act, all singled out the NGPA as the primary reason for their opposition. Of those who opposed the NGPA, a clear majority listed the complexity of the NGPA and the added bureaucracy it would bring as a primary reason for their opposition. *See* 124 Cong. Rec. 38350-503 (1978).

3. The Natural Gas Policy Act of 1978.

The NGPA is divided into six titles: Wellhead Pricing (Title I); Incremental Pricing (Title II); Additional Authorities and Requirements (Title III); Natural Gas Curtailment Policies (Title IV); Administration, Enforcement and Review (Title V); and Coordination with the Natural Gas Act; Effect on State Laws (Title VI).

The NGPA's intended effect on the interstate gas market was summarized by Rep. John Dingell [18] in his presentation of the NGPA Conference Report to the House:

> First, by delaying price deregulation until the mid-1980's the bill allows sufficient time for gradual interim pricing mechanisms to raise the price of new gas from historically underpriced levels to a point where the market can clear. However, because the bill does not "vintage" gas by year, it does not create incentives for producers to withhold sale of gas in anticipation of qualifying for deregulation in the future.
>
> Second, windfall profits are avoided. Phased deregulation in the mid-1980's under this bill will avoid a transitional bump in prices which would be caused by deregulation and would generate windfall profits. In addition, the bill specifically excludes withheld gas from qualifying for deregulation. I believe the manner in which the bill's deregulation mechanisms will operate, including a safety-net mechanism permitting rapid Presidential or congressional reimposition of controls, overcomes the objections on which my previous opposition to deregulation was based. Yet the bill offers the incentives which supporters of deregulation have advocated in the past. For these reasons, I believe the bill to be a workable compromise of competing concerns.

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[18] Rep. Dingell was Chairman of the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, one of the conferees signing the Conference Report, and a "floor leader" during the debates on this bill.

> Third, incremental pricing is substituted for wellhead price controls as a market ordering device. The delay of deregulation is necessary to enable this substitute mechanism to eliminate present day market distortions prior to deregulation.
>
> Incremental pricing will put an upper limit on the prices pipelines will be willing to pay for gas supplies. The ability of gas-hungry interstate pipelines to average-in comparatively small volumes of deregulated supplies of new gas with far greater volumes of cheaper old gas would result in a bidding war between pipelines for new gas supplies. This bidding war would be exacerbated by current pipeline rate regulation which ties profitability to throughput volumes. Thus, the price of deregulated new gas would be bid to excessively high levels as pipeline managers seek to maximize throughput volumes and thereby pipeline profits.
>
> Incremental pricing solves this problem by focusing initial price increases on the pipelines' most price sensitive customers: historically underpriced industrial users. By allowing the delivered price of these customers gas to rise to the level of alternative fuels, incremental pricing limits the ability of the pipeline to pass through high prices for new gas. Constrained by the limits this places upon the pass through of increased costs of gas, pipelines will be forced to bid responsibly for deregulated supplies of gas or face a loss of customers and an associated reduction in throughput volumes and profits.

124 Cong. Rec. 38361 (1978).

Sections 101-109 of Title I of the NGPA, 15 U.S.C. §§ 3311-19, establish "maximum lawful ceiling prices" for "first sales" of eight major categories covering all natural gas.[19] Unlike regulation under the NGA, in which wellhead

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[19] Eligibility to collect up to the maximum lawful prices of the newly created categories was (and is) not automatic. The producer must first obtain a determination from the appropriate "jurisdictional agency" that the gas it intended to sell meets FERC's qualifications for that particular

prices were determined after extensive cost-of-service rate hearings, maximum lawful ceiling prices for "first sales" are fixed by statute and subject to statutorily fixed rates of escalation. Section 101(b)(9), 15 U.S.C. § 3311(b)(9), also makes it clear that gas prices for first sales would be determined by existing and future contracts if the contracts called for prices below any applicable maximum lawful ceiling price.

Sections 121 and 122, 15 U.S.C. §§ 3331-32, establish a phased elimination of wellhead price ceilings for the new gas classifications and "standby price control authority" for reimposition of price ceilings if deemed necessary by either the President or Congress. Under Section 121(b), price ceilings on certain "high cost gas" were eliminated November 1, 1979, the effective date of the first stage of the Commission's incremental pricing regulations.[20] As of January 1, 1985, wellhead price ceilings were lifted on still more categories of new gas.[21] Section 122 authorizes either the President or Congress to reimpose price controls on these deregulated categories at any time between July 1, 1985 and June 30, 1987 for a period of 18 months.

Title V addresses the administration, enforcement, and review powers of both FERC and state "jurisdictional agencies" under the NGPA. Section 501, 15 U.S.C. § 3411, makes it clear that the FERC is primarily responsible for the administration and enforcement of the Act.[22] It pro-

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category. These qualification procedures are governed by Section 503 of the NGPA and FERC regulations promulgated thereunder.

[20] 44 Fed. Reg. 61950 (1979).

[21] 49 Fed. Reg. 50637 (1984).

[22] In his September 8, 1978 letter to Senator Jackson, Mr. Charles Curtis, the Chairman of FERC, states:

> Under the NGPA, the Commission is to be vested with an array of administrative and enforcement devices traditionally given to regula-

vides the necessarly rule-making and enforcement authority for FERC to carry out its functions and further gives FERC the discretion to delegate to any state agency its functions under the NGPA with respect to *intrastate* gas.[23]

Section 503 sets forth the administrative scheme under which determinations are to be made as to which pricing category or categories apply to gas production from a particular well. Section 503(c)(1), 15 U.S.C. § 3413(c)(1), provides:

> A Federal or State agency having regulatory jurisdiction with respect to the *production* of natural gas is authorized to make determinations referred to in subsection (a) of this section.

(emphasis added). Those determinations, however, must be made in accordance with the form and content established by FERC. Further, the state implementation of such determinations were subject to FERC approval.[24] Finally, all determinations are also subject to review and reversal by FERC.[25]

> tory agencies. Principal among these are the enforcement mechanisms which will allow the Commission to compel compliance with the Act through injunctive actions in the courts and to improve civil and criminal penalties for violations of the requirements of the Act or the regulations of Commission. In a number of respects, these mechanisms are more substantial than those available to the Commission at present under the Natural Gas Act. Moreover, the Commission has been given certain administrative powers, which exceed those currently available to the Commission under existing laws.

FPAS NGPA Inf. Serv. § 21 at 1-2.

[23] The only delegation under this section made by FERC to date has been "the authority to receive reports required by . . . an intrastate pipeline pursuant to sales made under Section 105 and 106(b) of the NGPA." 18 C.F.R. § 274.401(a).

[24] Section 503(c)(3), 15 U.S.C. § 3413(c)(3), 18 C.F.R. Part 274.

[25] Section 503(b), 15 U.S.C. § 3413(b).

In Section 505(a)(1), 15 U.S.C. § 3415(a)(1), FERC is given authority to intervene into any state agency proceedings "relating to the prorationing of, or other limitations upon, natural gas *production* which is conducted by any State agency having regulatory jurisdiction over the *production* of natural gas." (emphasis added).

Title VI of the NGPA sets forth the effect of this legislation on existing federal and state law. Section 601, 15 U.S.C. § 3431, establishes the NGPA's "Coordination with Natural Gas Act." It provides that Natural Gas Act jurisdiction and regulations which would have applied *solely by reason of* (1) "first sales" of gas classified under "high cost" and other new gas categories created in Title I; (2) transportation of gas under Section 311(a) or; (3) transportation of gas pursuant to the emergency purchase or allocation authority of Sections 302 and 303 are not longer applicable to those transactions. As Senator Jackson explained to the Senate:

> Generally speaking, except for gas which is committed or dedicated to interstate commerce on the day before the date of enactment, the current utility-type regulatory mechanisms would be terminated. Thus, it would no longer be incumbent on *producers* to obtain certificate authorization for new sales in interstate commerce, dedication of new gas reserves would not be required nor would a *producer* need abandonment permission from the Commission to allow it to sell gas to another upon conclusion of the contractual term. Also, in the case of sales of gas not previously committed or dedicated to interstate commerce occurring after the date of enactment, tariff filings and rate increase applications would be dispensed with.

124 Cong. Rec. 29108 (1978) (emphasis added).

In lieu of the NGA-type regulation, less burdensome regulatory controls were created in the NGPA. FERC Chairman Curtis noted some of the changes in his September 8, 1978 letter to Senator Jackson:

> The provisions of the Natural Gas Policy Act exempting from Natural Gas Act-type regulation gas that would otherwise be subject to Commission regulation limit the authority of the Commission to control the entry of natural gas into interstate commerce and to require continuation of service until the Commission authorizes the abandonment of such sales under section 7 [717f] of the Natural Gas Act. . . .
>
> While the NGA authorization for these controls would cease under the NGPA, a substitute mechanism of more limited scope would be available to the Commission in the exercise of its general grant of rule-making authority to implement the substantive provisions of section 110 [3320] (processing and treating costs flow-through), section 315 [3375] (contract duration, right of first refusal, filing of contracts and agreements) and section 503 [3413] (eligibility for ceiling prices).
>
> The Commission's exercise of abandonment authority under section 7 of the NGA provided supply security that was essential during the period of pipeline construction and is today a valuable regulatory tool to prevent diversion of interstate gas to higher priced intrastate markets. Natural Gas qualifying for NGA exemption under 601[3431](a)(1)(A) or (B) need not obtain Section 7(b) abandonment authorization. The supply security function of section 7 of the NGA would be achieved by the Commission's use of its authority under section 315(a) of the NGPA to set the minimum duration of new contracts, within certain stated limits. Subsection (b) of section 315 gives the Commission another tool with which to preserve interstate pipeline reliance on a source of supply. . . . [S]ection 315(b) provides a right of first refusal to the pipeline whose contractual right to purchase has expired for any presently committed or dedicated gas which, after date of enactment, would no longer be subject to the Natural Gas Act. The embedded costs of transportation facilities installed by the contracting pipeline when service commenced should create adequate incentive for the pipeline to hold on to the gas supply. The right of first refusal, in essence, assures that the pipeline will have the opportunity to do so.

FPAS NGPA Inf. Serv. § 601:220, at 3-4.

Section 602(a), 15 U.S.C. §3432(a), grants the states authority to establish even lower maximum lawful ceiling prices for gas produced and sold within the state. In enacting Section 602(a), the Conference Committee stated:

> The conference agreement provides that nothing in this Act shall effect the authority of any State to establish or enforce any maximum lawful price for sales of gas in intrastate commerce which does not exceed the applicable maximum lawful price, if any, under Title I of this Act. This authority extends to the operation of any indefinite price escalator clause. The Congress enacts this provision with a recognition that it is ceding its authority under the commerce clause of the Constitution to regulate prices for such production to affected States.

H.R. Rep. 1752, 95th Cong., 2nd Sess. 124-25 (1978); S. Rep. 1126, 95th Cong., 2nd Sess. 124-25 (1978).

B. FERC's Assertion of Jurisdiction Over the Purchasing Practices of Transco since the Enactment of the NGPA.

The NGPA has certainly modified the method by which FERC regulates the interstate gas market. However, the exclusive nature of its jurisdiction over interstate pipelines such as Transco and their purchasing practices has never been in doubt as far as FERC was concerned.

As early as February, 1981, FERC established proceedings to investigate charges that the purchases of high cost gas by interstate pipelines, including Transco, were not just and reasonable under Section 4 and 5 of the Natural Gas Act or Section 601(b) of the NGPA.[26]

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[26] See J.A. 174-92. The initial order by FERC found that the proposed tariff sheets filed by Transco had "not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful." J.A. 185, 14 FERC ¶ 61204 (1981).

In a subsequent order dealing with consumer protests of Transco's rate filing, the FERC stated:

> In a number of other orders accepting PGA filings, we have interpreted allegations of fraud, abuse or similar grounds as challenges to the pipeline company's purchasing practices. We find that similar treatment is warranted for the complaint of the Attorney General of the State of New York because the essence of his complaint is that Transco paid too much for its gas. According to the Attorney General, the resulting rates are not just and reasonable within the meaning of Sections 4 and 5 of the Natural Gas Act. Consistent with our actions in the previous cases, we hereby institute a proceeding under Section 5 of the Natural Gas Act for the purpose of considering the Attorney General's protest regarding prices and purchasing practices of Transco.

Transcontinental Gas Pipe Line Corporation, 23 FERC ¶ 61292 (1983).

On June 2, 1983, FERC noticed its "Inquiry Into Purchasing Practices of Interstate Pipelines" and stated:

> Some producers have alleged that the interstate pipelines are engaging in discriminatory purchasing practices against some producers, which is resulting in denial of access to natural gas markets, drainage and waste. The Commission is unclear as to whether these allegations have merit. Pipelines' current purchasing practices may be, at least in part, a reasonable response to reduced market demand and an attempt to prevent further price increases to their natural gas customers.
>
> The Commission continues to maintain that State regulation of the purchasing practices of interstate pipelines impermissibly invades the Commission's jurisdiction. In enacting the Natural Gas Act, Congress intended to establish a comprehensive scheme of federal regulation of interstate pipelines. Major reasons for establishing the federal scheme were prevention of undue discrimination by interstate pipelines by virtue

> of their monopsony and monopoly positions, filing the regulatory gap where States could not act effectively, and protecting natural gas consumers from unreasonably high gas prices. 15 U.S.C. §§ 717, 717c, 717d (1976); Federal Trade Commission, Utility Corporations, S. Doc. 92, 70th Cong., 1st Sess. (1936). Congress charged the Commission with the authority and responsibility to administer the Act.
>
> In light of the foregoing, the Commission believes that it is incumbent on it to examine the situation and determine whether Commission action is warranted.

48 Fed. Reg. 25264 (1983).

Most recently, FERC has issued two notices pertaining to an extensive rule-making proceeding designed to review every facet of its regulation of interstate pipelines, in light of the Congressionally-mandated transition to competitive pricing of natural gas at the wellhead" and the "implications of partial wellhead decontrol on its regulation of interstate pipelines."[27] Among the significant issues currently being addressed in this proceeding are (1) whether FERC can or should require jurisdictional pipelines to transport "non-owner shippers'" gas; (2) what, if any, new factors should be considered in establishing a pipeline's resales and transportation rates which would increase competition both at the wellhead and at the burner tip; and (3) how should FERC treat the "risk" factor of a jurisdictional pipeline's rates so that it does not inappropriately bias either pipelines or their customers nor hinder competiton at the wellhead or the burner tip.

C. Mississippi's Attempt to Regulate Transco and its Purchases.

Oblivious to the scope of this federal regulatory scheme, the Mississippi State Oil and Gas Board felt compelled to

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[27] 50 Fed. Reg. 114 (1985); 50 Fed. Reg. 3801 (1985).

respond to the plea of a local producer that had misjudged its market.

On July 29, 1982, after receiving correspondence indicating that Transco was no longer willing to purchase gas which it was not contractually obligated to take, Coastal Exploration (Coastal) filed a petition with the Board seeking to have it require Transco to purchase Coastal's gas under the same terms and conditions that the well operators were receiving for the sale of their gas under long-term contracts with Transco.[28] R. 19-26. Coastal was a working interest owner without a sales contract in four wells producing gas from a single pool which had been classified as "high cost" gas under the NGPA.

The Board was statutorily created by and is charged with the duty of effectuating and enforcing the Mississippi conservation statutes.[29] In 1952, the Board had enacted, along with other general, statewide rules, its Rule 48:[30]

> Each person now or hereafter engaged in the business of purchasing oil or gas from owners, operators, or producers shall purchase without discrimination in favor of one owner, operator, or producer against another in the same common source of supply.

Transco objected to the Board's assertion of jurisdiction over an interstate pipeline. R 75. At the Board hearing, the parties stipulated that Transco was a pipeline subject to the jurisdiction of the FERC. J.A. 147-49. Transco also put on evidence that, due to rapid escalation of its average

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[28] Other non-operators without contracts, as well as the operator who were selling their gas under long-term contracts, intervened in the proceeding at the Board.

[29] Miss. Code Ann. §§ 53-1-1 to -101 (1972 and Supp. 1984). The Mississippi Conservation Act was enacted, essentially in its present form, in 1948.

[30] Rule 48 is entitled "Ratable Take". Prior to the NGPA, this rule was admittedly invalid. It had been enforced only one previous time by the Board. *See* J. S. App. A at 52a.

gas costs and the recent loss of some of its industrial resales customers to alternative fuels, it already had under contract 520 million feet of gas per day more than it could re-sell. J.A. 160. Consequently, it could not purchase any gas it was not already contractually obligated to take without increasing take-or-pay exposure and the threat of additional loss of its resales market. J.A. 161-64. Transco also testified that it had just entered into a "Memorandum of Understanding" to settle the proceedings begun before FERC in February of 1981 challenging its purchase of high cost gas. J.A. 206-11.

The Board's response to Transco's "problems" was perhaps best revealed in the following statement by the Board's Chairman at its hearing:

> I really don't want to cut you off, Mr. Stewart. I would like for you to make all of the record that you would like to, but insofar as I'm concerned, the other Board members may have different ideas, but I don't think the trials and tribulations and the troubles of Transco has anything to do with any part of this hearing. Like I say, Rule 48 is what we are here to talk about. And whether they can sell it or can't sell it, Rule 48 doesn't say anything about that.

J.A. 165.

Transco representatives further testified that Transco was not seeking to contract for any new reserves due to excess deliverability but, as a concession to one of the operators, it had recently made an offer to Coastal and the other working interest owners in these particular wells to either dedicate their gas to Transco under a long-term contract but at a lower price [31] or Transco would transport their gas for sale to another purchaser. J.A. 66-69, 224.

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[31] Transco's offer was to purchase this gas consistent with its "Memorandum of Understanding," *i.e.*, at $5.00 per mmbtu, subject to further reductions if it continued to experience market clearing problems in its resale areas.

Coastal testified that it had refused to accept this offer because it felt Transco was discriminating against it and other small interest owners by continuing to pay Getty Oil $7.90 per mmbtu for gas being produced from the same well and reservoir.[32] J.A. 75-78.

The Board found Transco in violation of Rule 48 for discriminating against small interest owners and causing drainage, and imposed the following order:

> Transcontinental Gas Pipe Line Corporation ("Transco") is hereby ordered immediately and forthwith to comply with Statewide Rule 48 of the State Oil and Gas Board of Mississippi in its purchases of gas from the said Harper Sand Gas Pool in Greens Creek and East Morgantown Fields, and that, if Transco chooses and elects to take and purchase gas produced from the said common pool and the wells producing therefrom, Transco shall ratably take from the wells producing from the common pool; and shall ratably take and purchase gas without discrimination in favor of one owner, operator or producer against another in the said common source of pool; and, specifically, in the event it so chooses and elects to take and purchase gas produced from the said common pool, Transco shall ratably take and purchase without discrimination in favor of the operators Getty and Tomlinson against Coastal, the Fairchilds, and Inexco.

J.S. App. C at 112(a).

On appeal, the Mississippi Supreme Court affirmed the Board's order to the extent that it required Transco to take and purchase gas ratably from all owners in a common pool. However, it reversed the Board's obvious attempt to force Transco to purchase at a higher price on the grounds that the Board had no statutory authority under the Mississippi conservation statutes to regulate prices. J.S. App.

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[32] The $7.90 price was the redetermined price due under Getty's long-term contract which had been executed in August 1980. J.A. 34-36.

A at 48a-55a. Nevertheless, the Mississippi Supreme Court made it clear that it did not consider state regulation of an interstate pipeline's purchase prices to be constitutionally barred. J.S. App. A at 50a. It further warned that a pipeline must offer to ratably purchase gas in Mississippi from all owners in a common pool "in good faith [on] reasonable terms, including a reasonable price, determined by reference to prevailing market conditions and other appropriate economic considerations," in order to comply with the Board's Rule 48. J.S. App. A at 55a.

SUMMARY OF THE ARGUMENT

I. Preemption by the NGA and NGPA.

Mississippi's ratable take rule is unconstitutional when applied to interstate pipelines because it is preempted by the pervasive scheme of federal regulation over sales and transportation in interstate commerce. In 1938, Congress, through the NGA, determined that sales and transportation in interstate commerce were of national concern and that federal regulations would completely occupy the field. In 1963 this Court voided a Kansas ratable take order because of the "imminent possibility of collision" with the pervasive and exclusive federal jurisdiction over interstate pipelines and the intricate relationship between their cost structures and eventual cost to wholesale customers. *Northern Natural Gas Corp.* v. *State Corporation Commission,* 372 U.S. 84, 92 (1963).

The NGPA did nothing to eliminate or restrict the federal domain or interest over sales and transportation of gas in interstate commerce. It did supplant the ineffective utility-type regulation of wellhead sales with a less burdensome scheme which was intended to complement natural market pressure from competitive fuels. However, the legislative history gives no indication of any Congressional intent to allow states to intrude into a federal domain that

has been established since 1938. In fact, it is clear that the NGPA was designed to expand the federal scheme into the intrastate market to the extent necessary to affect the "national energy policy." Under the revised scheme, states are to maintain their traditional jurisdiction over drilling and production and have limited authority to mandate lower prices on intrastate sales.

Because of current market conditions, Mississippi's mandate to ratably purchase deregulated gas not under contract will directly increase Transco's acquisition costs and will affect the quantities or mix of gas which Transco must resell. This is a direct interference with FERC's exclusive jurisdiction over Transco's costs and resales rates, even more intrusive than the interference condemned by this court in *Maryland* v. *Louisiana*, 451 U.S. 724 (1981), and *Exxon Corp.* v. *Eagerton*, 462 U.S. 176 (1983).

Mississippi's Rule 48 also stands as an obstacle to the accomplishment of Congressional objectives underlying the NGPA. The phased elimination of ceiling prices and regulation under the NGA over certain incentive categories of gas is a federal decision to forego direct regulation. Such a decision to forego regulation is no less pre-emptive in its effect than enacting regulations. *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375 (1983). Mississippi's attempt to assert jurisdiction over "deregulated" gas is also inimical to a primary purpose of the NGPA, the elimination of bifurcated markets for natural gas. If producing states have the authority to force additional deregulated gas into interstate commerce during a surplus, it is natural to assume that they will attempt to withhold it under that same authority during the next shortage.

Finally, Mississippi's order is in direct conflict with FERC's "Inquiry into Purchasing Practices of Interstate Pipelines," 48 Fed. Reg. 25264 (1983), and its inherently broad transportation jurisdiction over interstate pipelines.

FPC v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972); *United Gas Pipe Line Co.* v. *FPC*, 385 U.S. 83 (1966). The effect of Mississippi's order has also been put at issue in Transco's latest tariff filing before FERC.

II. The Impermissible Burden and Discrimination Against Interstate Commerce.

Under present market conditions, Mississippi's ratable take order leaves Transco with no choice but to decrease its takes from contract sellers in order to begin purchasing gas from non-contract producers in Mississippi. Because of high percentage take-or-pay contracts and Mississippi's refusal to regulate production on market demand, this will necessitate a reduction in contract purchases in other states to accommodate the increased takes from Mississippi. This is precisely the type of discriminatory attempt to achieve economic protection for local interests from a national problem which the Court has previously condemned. *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923).

Even if Transco could reduce its contract purchases just under existing Mississippi contracts, such a reduction will expose the pipelines to increased claims under their long term supply contracts for contract gas not taken. Under current federal regulation, pipelines' "take-or-pay" costs are capitalized and a return thereon passed through to the consumer. The result will directly increase the price paid for gas by the interstate consumer. Such state-imposed price burdens on interstate commerce are impermissible. *FPC* v. *Corporation Commission*, 362 F. Supp. 522 (W.D. Okla. 1973), *aff'd*, 415 U.S. 961 (1974). *See*, *Kassell* v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

Because Rule 48 has been deemed applicable only to deregulated gas, J.S. App. A at 29a, partial enforcement will

also result in greater pipeline takes of deregulated gas and a reduction in purchases of less costly regulated gas. This constitutes yet another unconstitutional price burden on the interstate consumer.

Moreover, the Board has wholly failed to utilize an obviously constitutional regulatory alternative which would not burden interstate commerce. Direct regulation and allocation of production is the proper method of eliminating drainage between competing producers. *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210 (1932). Therefore Rule 48 violates the Commerce Clause.

ARGUMENT

I.

Efforts by Mississippi to Force Transco to "Ratably" Purchase High Cost Gas From Producers with No Contract are Preempted.

The standards of preemption by which this state action must be judged are well established. *See, Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 182 (1983). It is respectfully submitted that Mississippi's ratable take order is preempted under these standards in three ways.

First, the federal interest in and regulation of sales and transportation of natural gas for resale in interstate commerce is still so dominant and pervasive as to preclude the enforcement of any state laws in this field. Second, the state's mandate to purchase non-contract gas stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in promulgating the Natural Gas Act and the NGPA. Finally, Mississippi's ratable take order directly invades and conflicts with FERC's assertion of jurisdiction over the purchasing practices of interstate pipelines.

A. The Pervasive Federal Interest in the Interstate Gas Market.

When the Natural Gas Act was enacted in 1938, Congress intended to occupy the field of wholesale sales and transportation of natural gas in interstate commerce. *Exxon Corp.* v. *Eagerton*, 462 U.S. at 184; *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954). This legislation was intended to completely fill the regulatory gap between traditional state regulation of the production and gathering of interstate natural gas and the direct sale of this gas to end-users. *See FPC* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950).

A state's jurisdiction over "production and gathering" has traditionally been limited to the actual act of producing the minerals, as well as the facilities necessary to collect those minerals. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. at 677-78.[33] In *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682 (1947), the contention that wellhead sales was part of the local gathering process was firmly rejected:

> By the time the sales are consummated, nothing further in the gathering process remains to be done. We have held that these sales are in interstate commerce. It cannot be doubted that their regulation is predominately a matter of national, as contrasted to local concern. All the gas sold in these transactions is destined

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[33] *See Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210 (1932), where, in upholding the state's power to regulate and allocate production among wells, the Court stated:

> It is clear that the regulations prescribed and authorized by the Act and the proration established by the commission apply only to production and not to sales or transportation of crude oil or its products. Such production is essentially a mining operation and therefore is not a part of interstate commerce even though the product obtained is intended to be and in fact is immediately shipped in such commerce.

Id. at 235.

> for consumption in states other than Louisiana. Unreasonable charges exacted at this stage of the interstate movement become perpetuated in large part as fixed items of cost which must be covered by rates charged subsequent purchasers of the gas, including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed.

Id. at 692-3.

Northern Natural Gas Corp. v. *State Corporation Commission*, 372 U.S. 84 (1963) (hereinafter *Northern Natural*) clearly banned state ratable take regulations. The Court held that wellhead purchases by an interstate pipeline are within the federal dominion and regulatory scheme and cannot be regulated by the states. This holding was not based on the premise that a direct conflict existed between the Kansas ratable take order and some Commission regulations on the particular wellhead sales.[34] *Northern Natural* was instead based on the practical reality that any controls placed on the purchase of gas by an interstate pipeline are inextricably linked with the access to and ultimate cost of gas for the interstate consumer:

> [A]ny readjustment of purchasing patterns which such orders might require of purchasers who previously took unratably could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States. This relationship is a matter with respect to which Congress has given the Federal Power Commission paramount and exclusive authority. . . . The prospect of interference with the federal regulatory power in this area is made even more acute

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[34] In *Northern Natural*, all of the gas produced was under contract and all had been certificated by the Federal Power Commission into interstate commerce. Wellhead price was not at issue. The real issue was that, by requiring ratable purchases, Kansas was creating take-or-pay claims which then had to be addressed by FERC in pipeline rate proceedings. *See* 372 U.S. at 86-7, 372 U.S. at 98 (Harlan, J., dissenting).

> by the fact that criminal sanctions imposed by state statute for noncompliance fall upon such purchasers and not upon local producers.

Id. at 92 (citations deleted).

The respondents in this case have conceded that, but for the NGPA, Mississippi's action would be preempted. It is, we submit, now incumbent upon them to show (1) that Congress intended to remove wellhead purchases by an interstate pipeline from the long-standing national concern and regulatory scheme and (2) that Congress intended to allow states to begin to regulate terms and conditions of those purchases. The answer to both questions is resoundingly "*No*" when one looks at the complete scope of the NGPA and its legislative history.

The NGPA was designed, in part, to alter the NGA's regulatory scheme over wellhead sales because that scheme had proven unresponsive to market changes. If Congress had just wanted to get out of the business of regulating wellhead sales, it would have done just that.[35] Instead, Congress created a complex new scheme for these "first sales" to complement continued regulation of interstate pipelines under the NGA. In *Public Service Commission* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 331 (1983), the Court stated:

> The NGPA is designed to preserve the Commission's authority under the NGA to regulate natural gas sales from pipelines to their customers; however, it is designed to supplant the Commission's authority to establish rates for the wholesale market, the market consisting of so-called "first sales" of natural gas.

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[35] On at least five occasions in the past, legislation designed to exempt independent producers and their wellhead sales from federal jurisdiction has failed to pass. *See* H.R. 4051, 80th Congress, 1st Sess. (1947); H.R. 4099, 80th Congress, 1st Sess. (1947); H.R. 1758, 81st Congress, 1st Sess. (1949); and S. 1498, 81st Congress, 1st Sess. (1949); H.R. 6645, 84th Cong., 2d Sess. (1956); *see also*, Senator Aborezk's "History of Regulation of Natural Gas," 124 Cong. Rec. 30028 (1978).

The fact that this new federal scheme was intended to change or even reduce the previous regulatory burdens on wellhead sales and on producers does not make it any less pervasive or preemptive. It is clear that the utility-type regulation of wellhead sales to interstate pipelines under the Natural Gas Act was replaced with other "mechanisms" which, when combined with market supply/demand forces, were just as much of a "regulation' of those transactions as the ineffective ones being replaced.[36]

The legislative history of the NGPA makes it clear that Congress intended to expand federal dominion and control over natural gas. Far and away the most common cry among those Congressmen opposing the NGPA was its encroachment into traditional state regulatory areas and the additional regulatory maze which would be cast over the industry.[37]

The managers of the conference report, as well as others supporting the bill, argued that the extension of federal regulation into the intrastate market was necessary to combat the dual market which had significantly inhibited the interstate flow of gas supplies to non-producing states.[38] They also urged that the "first sales" scheme created

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[36] *See* pages 8-10 and 12-13, *supra*.

[37] 124 Cong. Rec. 28661 (1978) (Statement of Sen. John Tower). Sen. Henry Bellmon of Oklahoma also voiced strong opposition "to this extension of federal regulation." 124 Cong. Rec. 29101 (1978). Sen. Robert Dole of Kansas was opposed to the "extension of federal control to an unregulated and free market" and "more regulation to the producer." 124 Cong. Rec. 30021 (1978). Sen. Howard Baker of Tennessee opposed the bill because it "would increase the amount of regulation that exists in the industry by extending the regulatory powers of the federal government to the intrastate market." 124 Cong. Rec. 29116 (1978).

[38] The constitutionality of this extension of federal jurisdiction is no longer in doubt. *Oklahoma* v. *FERC*, 494 F. Supp. 636 (W.D.Okla. 1980), *aff'd*, 661 F.2d 832 (10th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982).

under the NGPA would reduce the federal regulatory burdens on producers and, combined with the higher incentive prices, operate to spur an increase in drilling and production.[39]

Rep. John Dingell specifically addressed the fears of opponents that the NGPA would allow FERC to move into the traditional jurisdiction of states over drilling and production:

> The legislation does not contemplate that FERC will intrude into the traditional conservation functions performed by the states. This is a matter reserved to the state agencies who, in the exercise of their historical powers, will continue to regulate such matters as drillings, locations, completion techniques, production rates, etc. Of course, the Secretary of Energy is authorized under Section 505 to intervene as a matter of right in state prorationing proceedings. This intervention authority, however, does not grant the Secretary any substantive powers or displace any state authority.

124 Cong. Rec. 38366 (1978). Nowhere in the legislative history of this bill is there any discussion of retracting federal interest in the interstate gas market or relinquishing control to the states. *See, e.g.*, Findings and Purposes, S. Rep. No. 95-436, 95th Cong., 1st Sess. 2-4 (1977); Findings and Statement of Purposes, H.R. Rep. No. 95-543, 95th Cong. 1st Sess. 9-13, 136-39 (1977).

The NGPA does grant to the states limited authority over wellhead sales in two specific instances. First, it gives the states the right to make initial determinations as to which Title I pricing categories production from their

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[39] *See* Comments of Sen. Henry M. Jackson, 124 Cong. Rec. 29108 (1978).

wells would be eligible for, subject to FERC guidelines and review.[40] Second, it gives states the right to prescribe lower maximum lawful ceiling prices for gas sold *intrastate*.[41] However, nowhere in the NGPA or in its legislative history is there any indication that Congress intended the states to have authority or control over first sales so different and more intrusive than that granted to them under Section 503(c) and 602(a).[42] *See, Exxon Corp.* v. *Eagerton*, 462 U.S. at 186.

Nowhere in the NGPA Conference Report or its legislative history is there any indication that Congress granted to the states any jurisdiction over any aspect of an interstate pipeline's operations. Nowhere is there any indication that Congress, well aware of this Court's past interpretations of NGA jurisdiction, intended to legislatively overrule or limit *Northern Natural*.[43] Given the efforts of Congress over the eighteen months preceding the enactment of the NGPA, and given the comprehensiveness of the bill itself, it must be concluded that Congress would have expressed an intention to allow states to enter this field if it had so intended. *See, e.g., Public Service Commission* v. *Mid-Louisiana Gas Co.*, 463 U.S. at 336.

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[40] Section 503(c), 15 U.S.C. § 3413(c).

[41] Section 602(a), 15 U.S.C. § 3432(a); *Energy Reserves Group, Inc.* v. *Kansas Power and Light Co.*, 459 U.S. 400, 406-07 (1983).

[42] The Mississippi Supreme Court agrees that the Board's ratable take order was not a determination of maximum lawful ceiling prices. J. S. App. A at 51a.

[43] For example, the conference report made it clear that it was prospectively limiting *California* v. *Southland Royalty Co.*, 436 U.S. 519 (1978) and did not intend to prejudice the outcome in *Shell Oil Co.* v. *FERC*, 566 F.2d 536 (5th Cir. 1978), *aff'd*, 440 U.S. 1273 (1979), then pending before this Court. S. Rep. 1126, 95th Congress, 2nd Sess. 71, 111 (1978).

B. Mississippi's Ratable Purchase Requirement is an Obstacle to the Accomplishment of Congressional Objectives Underlying the Natural Gas Act and NGPA.

Mississippi's order requires Transco to *purchase* natural gas that has no value to Transco.[44] This gas has no value because it displaces gas which Transco had contractually committed to take and because the reserves owned by non-contract sellers are not committed to the future needs of Transco and its customers.

Further, Mississippi requires that Transco purchase that gas at a "reasonable" price.[45] Thus, under present market conditions, whatever Transco is forced to pay for this gas increases Transco's actual acquisition costs. Furthermore, by asserting jurisdiction only over the higher priced categories of gas, Mississippi's rule directly affects the quantities or mix of the various categories of gas which Transco purchases with a resulting cost increase.

State laws with even less impact on interstate pipelines' costs were condemned in both *Maryland* v. *Louisiana*, 451 U.S. 724 (1981) and *Exxon Corp.* v. *Eagerton*, 462 U.S. 176 (1983). In *Maryland* v. *Louisiana*, Louisiana tried to statutorily impose its First Use Tax on interstate pipelines. The First Use Tax was enacted in 1978 on gas produced in federal waters offshore Louisiana then transported through Louisiana. This Court held that the NGA, as amended by the NGPA, preempted such a charge by the states:

> Under the Gas Act, determining pipeline and producer costs is the task of the FERC in the first instance, subject to the judicial review. . . . Even if the FERC

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[44] The Mississippi Supreme Court was well aware that this was the case. J. S. App. A at 45a-46a.

[45] The Mississippi Supreme Court's in essence means that the Board has the power to ensure that a pipeline's offer is reasonable, "determined by reference to prevailing market conditions and other economic considerations." J. S. App. A at 55a.

> ultimately determined that such expenses should be passed on *in toto*, this kind of decisionmaking is within the jurisdiction of the FERC; and the Louisiana statute, like the state Commission's order in *Northern Natural Gas, supra*, is inconsistent with the federal scheme and must give way. At the very least, there is an "imminent possibility of collision," *ibid.* The FERC need not adjust its rulings to accommodate the Louisiana statute. To the contrary, the state may not trespass on the authority of the federal agency.

451 U.S. at 751. The practical effect of Mississippi's ratable take order is identical to the Louisiana First Use Tax. Both create a state-ordered payment by an interstate pipeline which directly conflicts with FERC's authority to determine what costs should and will be passed to the ultimate consumer.

In *Exxon* v. *Eagerton*, this Court condemned Alabama's attempt to prohibit *producers* from passing through a statutory increase in the state severance tax on natural gas, to the extent that the increased tax applied to natural gas sold in interstate commerce. The Court stated:

> The Alabama pass-through prohibition trespassed on FERC's authority over wholesale sales of gas in interstate commerce, for it barred gas producers from increasing their prices to pass on a particular expense—the increase in severance tax—to their purchasers. Whether or not producers should be permitted to recover this expense from their purchasers is a matter within the sphere of FERC's regulatory authority. . . .

462 U.S. at 185.

Mississippi's ratable take order also conflicts with the intent of the NGPA that wellhead sales be governed by statutory maximum lawful ceiling prices and private contracts between producrs and purchasers. As stated in the Conference Report:

> The rule for application of ceiling prices pertains to maximum lawful prices. All maximum lawful prices

> are ceiling prices only. In no case may a seller receive a higher price than his contract permits.

H.R. Conf. Rep. No. 95-1752, 95th Cong., 2nd Sess. 74 (1978).

The fact that the NGPA first eliminated the statutory maximum lawful ceiling prices on "high cost" natural gas was the result of a Congressional determination that this classification needed "the maximum price incentive" in order to elicit "the maximum supply response at a minimum cost to consumers."[46] As the Mississippi Supreme Court itself observed:

> [A] federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision *to* regulate.

J.S. App. A at 28a, *citing, Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission,* 461 U.S. 375, 384 (1983). Congress left no room in its regulatory scheme for state-imposed purchases which would increase the cost of service of interstate pipelines to their customers, in direct conflict with the market clearing constraints designed into the NGPA.[47]

Mississippi's idea that states can now regulate "deregulated" gas is further inimical to a primary purpose of Congress in enacting the NGPA—to eliminate the bifurcated natural gas markets. Congress made it absolutely clear that it was expanding federal controls over *all* natural gas in order to achieve a uniform national energy policy and to eliminate the ability of producing states and pro-

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[46] This was the explanation given to the Senate by the floor manager for the NGPA, Sen. Henry M. Jackson, during the debates on the bill. 124 Cong. Rec. 28633 (1978).

[47] *See* Rep. Dingell's remarks at page 9, *supra*, concerning the intended effect of incremental pricing on a pipeline's purchases.

ducers to withhold supplies of gas from the rest of the nation. However, if interstate pipelines are now subjected to the "kaleidoscopic variations" [48] of state regulation over their purchases only in "deregulated" gas pools, the imminent possibility exists that states would use this power in a gas shortage to create the same market access problems the NGPA was designed to cure. As stated in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 633-5 (1972):

> [A] state agency empowered to regulate these contracts would be obliged to regulate in the State not the national interest. . . . The unavoidable conflict between producing States and consuming States will create contradictory regulations that cannot possibly be equitably resolved by the courts. With these problems in mind, the desirability of uniform federal regulation is abundantly clear.

C. The Direct Conflict with Ongoing FERC Regulation of Interstate Pipelines.

The "imminent possibility of collision" in this case is no longer just imminent; it is a reality.

First, Mississippi's order has already been specifically raised as being in possible conflict with the "just and reasonable" standards of the NGA in Transco's latest tariff filing before FERC.[49] The FERC simply should not be required to adjust its rulings to accommodate a Mississippi regulation. *Maryland* v. *Louisiana*, 451 U.S. at 751.

Secondly, FERC has specifically opened an inquiry on possible discrimination of interstate pipelines in their purchasing practices.[50] The fact that FERC has not issued

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[48] Compare Mississippi's approach to that proposed by Texas. *See* J. S. App. I at 136a.

[49] *See* Brief Amicus Curiae of Associated Gas Distributors in Support of Appellant's Jurisdictional Statement, 11-13 (February 1, 1985).

[50] *See* pages 15-16, *supra*.

specific orders or regulations in this matter does not make its active assertion of jurisdiction any less preemptive. *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission,* 461 U.S. at 384.

Finally, FERC is in the process of evaluating every facet of interstate pipelines' transportation and rate structure with the goal of enhancing pipelines' flexibility and competitiveness in the energy market.[51] Mandatory *purchase* by a pipeline from all producers in a particular pool or field, even at "reasonable" prices, is in conflict with FERC's encouragement of pipelines to transport more of other owners' gas.[52] Mandating the purchase of gas from all producers in a particular pool or field by a pipeline would significantly impair the broad jurisdiction which Congress gave FERC over interstate transportation of gas. NGA Sections 1(b) and 7(c), 15 U.S.C. §§ 717(b) and 717f (c). *FPC* v. *Louisiana Power & Light Co.,* 406 U.S. at 640-42; *United Gas Pipe Line Co.* v. *FPC,* 385 U.S. 83 (1966). FERC's jurisdiction must remain free of state interference in todays' complex and competitive gas market.

II.

Mississippi's Enforcement of Rule 48 Against an Interstate Pipeline Impermissibly Burdens and Discriminates Against Interstate Commerce.

The Commerce Clause of the Constitution, U.S. Const., art. I, § 8, cl. 3, specifically grants to Congress the power to regulate commerce among the states. Concomitantly, it also precludes burdensome or discriminatory state laws in

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[51] 50 Fed. Reg. 114, 3801 (1985).

[52] If a pipeline transports gas, for a reasonable fee, on behalf of a producer or end user, it incurs no additional acquisition costs. The transportation fees, in effect, subsidize cost of service that normally would be paid by its resale customers. *See,* 18 C.F.R. Parts 157 and 284.

this protected sphere, even in the absence of Congressional action. *Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 298, 307 (1924).

The reasons supporting this negative Commerce Clause are aptly stated in *H. P. Hood & Sons, Inc.* v. *Dumond*, 336 U.S. 525, 537-38 (1949):

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court stated in *Baldwin* v. *Seelig*, 294 U.S. 511, 527 "what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation."

Mississippi has attempted to place itself in just such a position of economic isolation by its enforcement of Rule 48 against an interstate pipeline. Although the Board recognized the existence of a nationwide glut in the natural gas industry, it expressly refused to consider the exacerbating effect of its action on the problem. J.A. 159, 165, 169. Instead, it took action calculated to secure a market for Mississippi producers of natural gas without contracts. the practical effect of its decision is to discriminate against other producing states and to burden the consuming states, all in violation of the Commerce Clause.

A. The Applicable Test Under the Commerce Clause.

It has been clear for many years that the purchase and transportation of natural gas for resale by interstate pipeline companies is interstate commerce and subject to scrutiny under the Commerce Clause. In *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923), the Court stated:

> Natural gas is a lawful article of commerce, and its transmission from one state to another for sale and

> consumption in the latter is interstate commerce. A state law, whether of the state where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs, or burdens such transmission, is a regulation of interstate commerce—a prohibited interference.

Id. at 596-97. *Accord, FPC* v. *Corporation Commission*, 362 F. Supp. 522 (W.D. Okla. 1973), *aff'd.* 415 U.S. 961 (1974).

Many of this Court's recent Commerce Clause cases recite a test enunciated in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) (hereinafter *Pike*), wherein the Court stated:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact of interstate activities.

Id. at 142.

The first consideration is whether the state enactment in question discriminates against interstate commerce, either on its face or in practical effect. *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979). When such discrimination is used for economic protectionism, the statute is virtually *"per se"* unconstitutional. *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978). *Accord, Bacchus Imports, Ltd.* v. *Dias*, 104 S.Ct. 3049 (1984) (stricter Commerce Clause scrutiny when there is discriminatory purpose or discriminatory effect).

On the other hand, if the effects of the questioned statute fall equally on both intrastate and interstate commerce, then the test requires a balancing of the local benefits

against the interstate burdens imposed. Also considered in this equation is the question of whether the state could have achieved its purposes with a less onerous impact on interstate commerce.[53] *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979).

In applying the Commerce Clause, this Court has consistently held that one cannot examine the challenged state regulation in a vacuum but must analyze its impact as it operates in the relevant industry—its "practical effect." *Id.* For example, in *Pennsylvania* v. *West Virginia* the Court looked at the "necessary operation" of the statute to determine whether it discriminated against or burdened interstate commerce. 262 U.S. at 597-98. The Court therein examined not only the provisions of the West Virginia act in question but also "the conditions which must surround its operation."[54] *Id.* at 597. In *Lewis* v. *B. T. Investment Managers, Inc.*, 447 U.S. 27, 37 (1980) the Court stated: "The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Accord, Best & Co.* v. *Maxwell*, 311 U.S. 454, 455-56 (1940). Thus, in examining the law in question, consideration must also be given to the practical circumstances under which the law may operate to create an impermissible burden on interstate commerce.

Although the applicable Commerce Clause test has been stated in various ways, this Court, in *Hughes* v. *Alexander*

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[53] The Mississippi Supreme Court ignored this requirement of the *Pike* test, finding instead that alternatives need not be considered until an "unreasonable burden on commerce" has been demonstrated.. J. S. App. A. at 38a.

[54] The Court has rejected burdens occasioned only by the fact that certain parties had chosen to package and market goods in a certain manner, *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333, 340 (1977), or to set up business operations in one state as opposed to another. *Pike*, 397 U.S. at 145.

Scrap Corp., 426 U.S. 794, 806 (1976), summarized the approaches as follows: "The common thread of all these cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation." As will be demonstrated, Mississippi has inferfered with the natural functioning of the market.

B. The "Practical Effect" of Mississippi's Ratable Take Order.

The facts as to the gas market facing Transco in 1982 have already been discussed in some detail. *See* J.S. at 15-19. Two conclusions from that discussion are relevant here. First, the total current interstate demand for gas is considerably less than pipeline purchase obligations. Transco and most other interstate pipelines therefore simply have no market for non-contract gas they may be forced to purchase in Mississippi. State-required purchases by Transco of non-contract gas in Mississippi will only displace contract gas and create additional take-or-pay claims.

Second, the crisis in the market is the product of many years of unsuccessful federal regulation and pipeline acquisition policies required and encouraged by such regulation. Transco's purchase contracts are a by-product of that environment and are not unique. Gas purchase contracts executed between 1978 and 1982 by nearly all interstate pipeline companies are long term contracts which contain seller-oriented price provisions with "one-way" escalators and high percentage take-or-pay provisions.[55]

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[55] In the instant case, some of Transco's 1978-80 vintage contracts have "take-or-pay" clauses requiring takes of between 85-100% of contract deliverability. J.A. 103-04.

Take-or-pay costs in all pipelines' rates were over $700,000,000 in 1982. Since that time, such costs, which are borne by consumers have increased substantially. Energy Information Administration, U.S. Dept. of Energy,

Pierce, *Natural Gas Regulation, Deregulation & Contracts*, 68 Va. L. Rev. 63, 77, 92-99 & 103 (1982).

In light of the above, for Transco (or any pipeline) to take "ratably," it must reduce its contract purchases in order to accommodate increased non-contract takes from Mississippi. This reduction in contract purchases results in increased take-or-pay claims under those contracts.[56] Because Mississippi refuses to consider market demand in its regulation of production, Transco is forced to begin purchasing gas from Mississippi non-contract producers at a level which would be ratable with its Mississippi contract purchases. Because of high take-or-pay contracts, the practical result will be a significant increase in Mississippi purchases with a significant decrease in Transco's purchases from other states. This results not only in discrimination in the amount of gas taken from other states. Reductions in purchases from other states also increase take-or-pay claims there.

While it may be possible for Transco to purchase modest quantities of deregulated non-contract gas and reduce just its contract purchases in Mississippi to ratable levels, this course would still expose Transco to significant additional take-or-pay claims for gas under contract that is not taken thereby increasing its cost of service.[57]

Structure and Trends in Natural Gas Wellhead Contracts 38 (1983). By December of 1983, take-or-pay prepayment balances totalled approximately one billion dollars. Energy Information Administration, U.S. Dept. of Energy, *Statistics of Interstate Natural Gas Pipeline Companies*, Table 20 (1983).

[56] These are the same options faced by Northern Natural in 1963 when confronted with the Kansas ratable take order. *Northern Natural*, 372 U.S. at 98-99, n. 1 (Harlan, J., dissenting).

[57] Theoretically, Transco could terminate all purchases in Mississippi. This is not a practical alternative and is not one which a state can validly offer to the interstate pipeline in order to avoid constitutional infirmity.

No matter what course is taken, there will be a net increase in total purchases of deregulated gas with a resulting decrease in takes of regulated reserves. Because the cost of regulated gas is generally less than the price of deregulated gas, such a state-created shift in purchasing patterns likelise results in increased pipeline costs which must then be passed on to the consumer.

C. Increases In Total Pipeline Takes from Mississippi Caused by Rule 48 Operate as a Prohibited Discrimination Against Interstate Commerce.

The inevitable result of an enforceable Rule 48, when combined with Mississippi's refusal to regulate production on anything but maximum deliverability,[58] will be some increase in the percentage of gas taken from the state of Mississippi by Transco. This must necessarily result in a decrease in pipeline purchases from other producing states. In the present market situation, Mississippi's action discriminates against other states by securing a larger share of a limited market for its producers.

The Supreme Court has struck down discriminatory state regulations on many occasions. Early in the history of the natural gas industry, concern about the continuing availability of adequate supplies of natural gas prompted several states to prohibit its export, thereby reserving this valuable resource for their own citizens. In both *Pennsylvania* v. *West Virginia* and *West* v. *Kansas Natural Gas*, 221 U.S. 229 (1911), such regulations were invalidated because they discriminated against the interstate consumer by attempting to isolate the state from a problem common to all. *Accord, Tenneco, Inc.* v. *Sutton*, 530 F. Supp. 411 (M.D. La. 1981). In other contexts, state laws have been

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Regulations which cause a company to cease doing business in a state are even more discriminatory than those discussed hereinbelow.

[58] *See*, Miss. Code Ann. § 53-1-1 (1972); J.A. at 92-95.

struck down because they likewise attempted to keep state-produced products within the state. *See, e.g., Sporhase* v. *Nebraska,* 458 U.S. 941 (1982); *Hughes* v. *Oklahoma,* 441 U.S. 322 (1979).

The scope of the Commerce Clause also extends to state laws which achieve economic isolation by discriminating against out-of-state competition. For example, in *Bacchus Imports, Ltd.* v. *Dias,* 104 S.Ct. 3049 (1984), Hawaii regulations which sought to encourage in-state liquor production were held unconstitutional because they also discriminated against out-of-state producers. Likewise, in *Hunt* v. *Washington Apple Advertising Commission,* 432 U.S. at 350, a North Carolina statute which effectively discouraged competition by Washington apple producers was overturned.

The practical effect of the Rule 48, to the extent that it increases purchases from Mississippi is to alter its market share at the expense of other producing states. Therefore, the Board's application of its Rule 48 on interstate pipelines interferes with the natural functioning of the national gas market and insulates Mississippi producers from difficult market conditions common to all-impermissible discrimination against interstate commerce. This Court described such a situation in *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117, 126 n. 16 (1978):

> If the effect of a state regulation is to constitute a larger share, and goods with an out-of-state source to constitute a smaller share of the total sales in the market—as in *Hunt,* 432 U.S. at 347, and *Dean Milk,* 340 U.S. at 354—the regulation may have a discriminatory effect on interstate commerce.

In this case, the Board expressed no actual intent to discriminate against other producing states. However, this Court has never allowed the state's characterization of its purpose to be determinative. *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1, 10 (1928). In numerous instances, the

Board refused to admit evidence proffered by Transco on the interstate impact of the enforcement of Rule 48. The Board steadfastly declined to consider such impact, even in light of its admitted knowledge of the national market glut. J.A. 158. Instead, the Board devoted its attention only to the question of whether or not Transco was taking ratably in Mississippi. J.A. 155-58, 163-69.

The Mississippi Supreme Court based its upholding of Rule 48 on the local interest in "fairness." J.S. App. A at 34-5a. However, it is clear Mississippi's regulation operates unfairly to producers in other states who sell to Transco or other pipelines operating in Mississippi.[59] Its effect, either intentional or unintentional, is to protect Mississippi natural gas producers by forcing Mississippi production onto the interstate market at the expense of production from other producing states.[60] Rule 48 discriminates against interstate commerce and is therefore unconstitutional.

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[59] In keeping gas well allowable production at maximum deliverability, without regard to the market, Mississippi provides impetus for its producers to file substantial take-or-pay claims. This fact, in and of itself, creates a burden on the interstate market not present in states which establish allowables based on market demand.

[60] The Mississippi Supreme Court dismissed Transco's prediction that increased purchases from Mississippi would result in decreased purchases elsewhere. The Court's principal response was to note that other states have ratable take statutes. J.S. App. A, at 36. However, this response is not correct. As noted above, Mississippi's regulations force excessive quantities of Mississippi gas onto the market. *See, e.g., Northern Natural Gas* v. *State Corp. Comm'n*, 372 U.S. at 86-9. Widespread enforcement of such regulations will unfortunately lead to direct state-on-state competition for larger shares of a very limited market. This is the very evil sought to be corrected by the Commerce Clause. *See Pennsylvania* v. *West Virginia*, 262 U.S. at 599.

D. The Impact of Rule 48 On the Cost of Gas in the Interstate Market Constitutes an Impermissible Burden.

Even if Transco could achieve ratable taking by only decreasing its Mississippi contract purchases of gas, the resulting increase in take-or-pay claims would still substantially increase its cost of service. Additionally, Mississippi's application of its ratable take authority only over price-deregulated gas results in greater purchases of deregulated reserves at the expense of regulated reserves. This directly increases the total cost of gas purchased. Both of these impacts result in increases in the price of natural gas to the interstate consumer.

This Court has long observed that such price increases can constitute impermissible burdens on interstate commerce. In *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761 (1945), the Court examined a state regulation which limited the length of trains below what was the standard practice in the industry. To break up and reassemble interstate trains at the Arizona line was found to be both expensive and inefficient. *Id.* at 772. Therefore, the Court found that the law impermissibly burdened interstate commerce.

Likewise, in *Hunt* v. *Washington Apple Advertising Commission,* 432 U.S. 333 (1977), Washington producers of apples challenged a North Carolina statute which prohibited the use of Washington's apple grading system. Although the Washington system was superior to the USDA grading system, only the latter was allowed to appear on cartons shipped into North Carolina. Washington growers could not comply with the statute without repackaging the apples or otherwise changing their usual practices—options which were characterized as "costly and less efficient." 432 U.S. at 338. The Supreme Court struck down

the statute, finding both a burden on and discrimination against interstate commerce. *Id.* at 350.

In both *Kassell* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 674 (1981), and *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429, 445 (1978), the Court struck down state laws which precluded the use of double-trailer trucks on state highways. In each case, the Court reasoned that the expense and delay which accrued by shippers having to either route their trucks around the offending states or repack their shipments placed a substantial, and unconstitutional, burden on interstate commerce.

In the area of natural gas regulation, interstate price burdens have long been the subject of judicial scrutiny. In 1950, the wellhead price of gas was relatively insignificant compared to interstate transmission costs. Therefore, state orders imposing a price burden of only a few cents per Mcf were held not to violate the Commerce Clause. *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179 (1950) (hereinafter *Peerless*).[61]

However, the gas market conditions which supported the *Peerless* decision have since changed dramatically. In *FPC* v. *Corporation Commission*, 362 F. Supp. 522 (W.D. Okla. 1973), *aff'd*, 415 U.S. 961 (1974), regulations setting a minimum price of only $.20 per Mcf were found to place an impermissible burden on interstate commerce. The court found that "*Peerless* no longer controls insofar as it holds that minimum price orders are not within the proscription

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[61] In fact, the Oklahoma Commission had found that the then prevailing prices were so low as to cause waste, losses to interest owners, tax losses to the state and discrimination. 340 U.S. at 183. These facts are in direct contrast to today's market where excessively high gas prices have contributed to loss of markets.

of the Commerce Clause." *Id.* at 535. One basis for distinguishing *Peerless* was the difference in the minimum price orders and their impact on the ultimate consumer. The three judge panel stated:

> The Court said in *Peerless* that "the wellhead price of gas is but a fraction of the price paid by domestic consumers at the burner-tip, so that the field price as herein set may have little or no effect on the domestic delivered price." In *Phillips*, however, the Court declared that the "rates charged may have a direct and substantial effect on the price paid by the ultimate consumers."

Id.

In today's market, gas at the wellhead costs dollars, not cents. For example, in *Cities Service Gas Co.* v. *FERC*, 627 F.2d 1027, 1028 (10th Cir. 1980), it was observed that, "[t]he cost of purchased gas constitutes the largest single component of a pipeline company's cost of service and it is an expense of doing business which is recovered by the pipeline in the rates it charges to customers." By 1982, Transco's cost of gas was over 82% of the delivered price. *See* J.A. 226.

The Mississippi Court held that the price increases occasioned by Rule 48 constituted only an "incidental," and therefore acceptable, interstate burden. This determination rests upon the court's conclusion that price increases to the consumer were sanctioned by and a necessary part of the NGPA. J.S. App. A at 35a-36a.

However, this Court has frequently stated that, although Congress may authorize the states to burden interstate commerce, such authorization must be explicit. *South Central Timber Development, Inc.* v. *Wunnicke*, 104 S.Ct. 2237, 2240-41 (1984); *Sporhase* v. *Nebraska*, 458 U.S. 941, 960 (1982); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982). The only explicit delegation of

Commerce Clause power appears in Section 602(a) of the NGPA.[62] There, the states were given authority only to impose lower ceiling prices and only over "first sales" of gas in the *intrastate* market.[63] S. Conf. Rep. No. 1126, 95th Cong., 2d Sess. 124-5 (1978); H. R. Conf. Rep. No. 1752, 95th Cong., 2d Sess 124-5 (1978); *Exxon Corp.* v. *Eagerton*, 462 U.S. at 186.[64] Mississippi's reliance on the NGPA is therefore misplaced because Congress has never expressly given the states authority over transportation or sales of "deregulated gas" in interstate commerce. Congress withheld this power from producing states in order to protect a fundamental national concern, the cost of gas to consuming states.

E. Constitutional Regulatory Alternatives Do Exist

In *Pike*, the Court observed that facially nondiscriminatory regulations which do burden interstate commerce may not pass constitutional muster if less burdensome alternatives are available to achieve the state's purposes.

The sole basis given by the Mississippi Court for upholding Rule 48 is to assure fairness by preventing drainage which might be caused by contract producers selling

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[62] As discussed above, page 11, *supra*, Section 503(c), 15 U.S.C. 3413(c) authorized state agency determination of price classifications, but subject to FERC control and review.

[63] Moreover, under the NGPA, prices are to be limited not only by ceilings but also by contracts *negotiated* between buyer and seller. See pages 31-32, *supra*.

[64] In *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 407 (1983), Section 602(a) was found to give Kansas the power to impose price ceilings on the sale of intrastate gas. No Commerce Clause issue was raised because the case did not deal with interstate gas. *Id.* at 413, n. 17.

gas while non-contract producers in the same pool are unable to do so. J.S. App. A at 34-5a.

Mississippi has an alternative to achieve this purpose, one which the state has clearly and intentionally ignored. In *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 235 (1932), the Court approved Oklahoma's proration regulations which precluded any owner of gas from *producing* more than his pro rata share of "market demand."[65] A primary basis for the Court's approval was that proration dealt with the production of natural gas and therefore occurred prior to entry of that commodity into interstate commerce.[66] In *Northern Natural*, 372 U.S. at 94, n. 12, the Court again suggested proration as a proper and effective alternative to the state ratable take orders found unconstitutional therein.

There is nothing that stops Mississippi from taking a similar approach.[67] A state can limit a local producer's right to produce more than his pro rata share of the available market for a common pool and effectively negate a purchaser's contract obligations in excess of that limit.

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[65] Oklahoma defined waste to include production in excess of market demand. 286 U.S. at 226. The State's action was prompted by serious potential overproduction, production which exceeded "all transportation and marketing facilities and market demands," *Id.* at 230, a situation not unlike today's gas market.

[66] See note 33, *supra*.

[67] The Mississippi Court discussed in detail the Board's broad powers, both express and implied, to protect Mississippi producers from drainage. J.S. App. A at 42a-48a. Additionally, the court cited *Barnwell, Inc.* v. *Sun Oil Co.*, 249 Miss. 398, 162 So.2d 635, 638 (1964), for the proposition that the "Board has power to allocate and apportion production." *Id.* at 45a. Although the Board has questioned its statutory authority under Miss. Code Ann. § 53-1-1 (1972) to consider market demand in setting well allowables, J.A. 93-95, the Mississippi legislature can certainly amend its law to eliminate any doubt.

See, Energy Reserves Group, Inc. v. *Kansas Power & Light Co.*, 459 U.S. 400 (1983). The available market can then be allocated to all owners without increasing the cost of service by interstate pipelines. Such action would eliminate any burden on interstate commerce while serving the states' interest in fairness.

Clearly, Mississippi has ignored a constitutional alternative to Rule 48 which does not impose a direct burden on interstate commerce. The Mississippi court further interpreted Rule 48 as requiring Transco to purchase at a "reasonable" price.[68] Since Rule 48 goes further than is necessary to achieve the state's purposes, and since there is an element of minimum price regulation, Mississippi has effectively sought to insulate its producers from a nationwide problem. Such economic protectionism should render the rule unconstitutional *per se*. *Philadelphia* v. *New Jersey*, 437 U.S. at 624. Alternatively, the fact that Mississippi's regulation intrudes so much further into interstate commerce than is necessary to achieve Mississippi's purpose indicates that the balancing required under *Pike* weighs heavily against the constitutionality of this regulation.

CONCLUSION

In its attempted enforcement of Rule 48, the Board acted in a somewhat predictable manner. The Board's principal function is the development and protection of oil and gas interests in the State of Mississippi. It is not charged with protecting consumers of natural gas, either within Mississippi or outside the state. Likewise, it is not charged by the Mississippi legislature with the obligation of regulating

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[68] We have previously detailed how increased purchases of deregulated gas, even at market prices, displace purchases of low cost regulated gas, thereby increasing consumer prices.

in the national interest. The Board's narrow focus is precisely the type of local prejudice that the Commerce Clause and the Supremacy Clause were designed to prevent.

In *South-Central Timber Development, Inc.* v. *Wunnicke*, 104 S.Ct. 2237 (1984), the Court, in discussing the Commerce Clause, stated:

> Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. Thus, "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."

Id. at 2243. The Court went on to state:

> On the other hand, when Congress acts, all segments of the country are represented and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a state is in such a position, the decision to allow it is a collective one.

Id.

Mississippi's attempt to regulate without regard to the national interest is the perfect example of why Congress did not intend to allow states to enter a field from which they had been excluded since 1938. Even though Congress has eliminated the ceiling on wellhead pricing of certain categories of natural gas, all available evidence indicates that it never intended to allow any state regulation of those sales in interstate commerce, especially in the manner attempted by Mississippi.

For the foregoing reasons, the judgments below should be reversed.

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APPENDIX

APPENDIX A

RELEVANT EXCERPTS FROM THE NATURAL GAS ACT

Section 1, 15 U.S.C. 717:

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission

that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

Section 4(b), 15 U.S.C. 717c(b):

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

Section 5(a), 15 U.S.C. 717d(a):

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

RELEVANT EXCERPTS FROM THE NATURAL GAS POLICY ACT OF 1978

Section 101(b)(9), 15 U.S.C. § 3311(b)(9):

Effect on contract price.—In the case of—

(A) any price which is established under any contract for the first sale of natural gas and which does not exceed the applicable maximum lawful price under this subchapter, or

(B) any price which is established under any contract for the first sale of natural gas which is exempted under part B of this subchapter from the application of a maximum lawful price under this subchapter,

such maximum lawful price, or such exemption from such a maximum lawful price, shall not supersede or nullify the effectiveness of the price established under such contract.

Section 107(c), 15 U.S.C. § 3317(c):

Definition of high-cost natural gas.—For purposes of this section, the term "high-cost natural gas" means natural gas determined in accordance with section 3413 of this title to be—

(1) produced from any well the surface drilling of which began on or after February 19, 1977, if such production is from a completion location which is located at a depth of more than 15,000 feet;

(2) produced from geopressured brine;

(3) occluded natural gas produced from coal seams;

(4) produced from Devonian shale; and

(5) produced under such other conditions as the Commission determines to present extraordinary risks or costs.

Section 121(a) and (b), 15 U.S.C. 3331(a) and (b):

Elimination of price controls for certain natural gas sales

(a) General rule.—Subject to the reimposition of price controls as provided in section 122[3332] of this title, the provisions of part A of this subchapter respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall, except as provided in subsections (d) and (e) of this section, cease to apply effective January 1, 1985:

(1) New natural gas.—New natural gas (as defined in section 102(c)[3312(c)] of this title).

(2) New, onshore production wells.—Natural gas produced from any new, onshore production well (as defined in section 103(c)[3313(c)] of this title), if such natural gas—

(A) was not committed or dedicated to interstate commerce on April 20, 1977; and

(B) is produced from a completion location which is located at a depth of more than 5,000 feet.

(3) Intrastate contracts in excess of $1.00.—Natural gas sold under an existing contract, any successor to an existing contract, or any rollover contract, if—

(A) such natural gas was not committed or dedicated to interstate commerce on November 8, 1978; and

(B) the price paid for the last deliveries of such natural gas occurring on December 31, 1984, or, if no deliveries occurred on such date, the price would have been paid had deliveries occurred on such date is higher than $1.00 per million Btu's.

(b) High-cost natural gas.—Effective beginning on the effective date of the incremental pricing rule required un-

der section 201[3341] of this title, the provisions of part A of this subchapter respecting the maximum lawful price for the first sale of natural gas shall cease to apply to the first sale of high-cost natural gas which is described in section 107[3317](c)(1), (2), (3), or (4) of this title.

Section 122, 15 U.S.C. 3332:

Standby price control authority

(a) Reimposition of price controls.—The President, in accordance with subsection (c)(1) of this section, or the Congress, in accordance with subsection (c)(2) of this section, may reimpose maximum lawful prices for first sales of natural gas to which section 121[3331](a) of this title applies and delivery of which occurs after the effective date of the reimposition of such maximum lawful prices.

(b) Limitations.—A reimposition of maximum lawful prices under this section—

(1) may not take effect earlier than July 1, 1985, nor later than June 30, 1987; and

(2) shall remain in effect for a period of 18 months.

(c) Procedure for reimposing price controls.—For purposes of this section—

(1) Presidential reimposition.—Any exercise of authority by the President under subsection (a) of this section shall be by written order issued after May 31, 1985, and, subject to subsection (b) of this section, shall take effect for the first month beginning after the first 30 calendar days of continuous session of Congress (as determined in accordance with section 507 [3417](b) of this title) after a copy of such order has been submitted to each House of the Congress unless during such 30 calendar days of continuous session of Congress, the Congress adopts a concurrent resolution

of disapproval described in section 507[3417](c)(1) of this title.

(2) Congressional reimposition.—Any exercise of authority by the Congress under subsection (a) of this section shall be by the adoption of a concurrent resolution after May 31, 1985, described in section 507 [3417](c)(2) of this title and, subject to subsection (b) of this section, shall take effect for the first month beginning after the date of the adoption of such resolution.

(d) Maximum lawful prices applicable under reimposition of price control.—If maximum lawful prices are reimposed under this section on first sales of natural gas to which section 121[3331](a) of this title applies, the maximum lawful price under this section for any first sale of such natural gas delivered during any month shall be—

(1) except as provided in paragraph (2), the maximum lawful price, per million Btu's, computed for such month under section 102[3312] of this title (relating to new natural gas); and

(2) the maximum lawful price, per million Btu's, computed for such month under section 103[3313](b)(2) of this title (relating to new, onshore production wells 5,000 feet or less in depth), in the case of natural gas produced from any new, onshore production well (as defined in section 103[3313](c) of this title) if such natural gas—

(A) was not committed or dedicated to interstate commerce on April 20, 1977; and

(B) is produced from a completion location which is located at a depth of 5,000 feet or more.

(e) Allowance for State severance taxes and certain production-related costs.—A price may exceed the maximum lawful price applicable for such natural gas under this

section to the same extent as it provided under section 110[3320] of this title with respect to maximum lawful prices under part A of this subchapter.

(f) Limitation.—Maximum lawful prices may be reimposed only once under this section.

Section 315, 15 U.S.C. 3375:

Contract duration; right of first refusal; filing of contracts and agreements

(a) Contract duration.—

(1) General rule.—The Commission may, by rule or order, specify the minimum duration of any contract (other than any existing contract) for the purchase of natural gas to which section 601[3431](a)(1)(A) or (B) of this title is applicable. In no case may the minimum contract duration specified under this paragraph applicable to natural gas produced from any reservoir exceed 15 years or, if less, the commercially producible life of such reservoir. The provisions of this paragraph shall not apply to contracts of natural gas subject to the requirements of paragraph (3).

(2) Nondiscriminatory application.—

(A) In general.—Except as provided in subparagraph (B), the Commission may not exercise the authority provided under paragraph (1) in a manner which—

(i) provides an advantage to interstate pipelines by diverting supplies fo natural gas to interstate pipelines and thereby denying adequate supplies of natural gas to intrastate pipelines; or

(ii) otherwise discriminates between purchases by interstate pipelines and intrastate pipelines of natural gas.

(B) Special circumstances.—The Commission may vary any requirement established under paragraph (1) with respect to any contract by an interstate pipeline or intrastate pipeline to the extent necessary to respond to special circumstances.

(3) Contracts for purchase of OCS natural gas.—The Commission shall prescribe a rule which shall require that any first sale contract (other than any existing contract) for the purchase of natural gas which is produced from any reservoir on the Outer Continental Shelf and which is new natural gas (as defined in section 102[3312](b) of this title) or high-cost natural gas (as defined in section 107[3317](c)(1), (2), (3), or (4) of this title) shall be for a duration of not less than 15 years or, if less, the commercially producible life of the reservoir.

(b) Offers; right of first refusal.—

(1) Application.—This subsection shall apply with respect to any natural gas which is committed or dedicated to interstate commerce on November 8, 1978, and which is—

(A) high-cost natural gas (as defined in section 107[3317](c)(1), (2), (3), or (4) of this title);

(B) new natural gas (as defined in section 102 [3312](c) of this title); or

(C) natural gas produced from any new, onshore production well (as defined in section 103 [3313](c) of this title).

This subsection shall not apply to any natural gas committed or dedicated to interstate commerce solely by reason of section 2[3301](18)(A)(i) of this title.

(2) Offer of sale.—The Commission shall, by rule, require that if natural gas subject to the requirements

of this subsection is produced on or after the first day of the first month beginning after November 9, 1978, a bona fide offer to sell such natural gas must be made to the person who, but for the provisions of section 601 [3431](a)(1)(B) of this title (relating to deregulation), would have been entitled pursuant to the commitment or dedication of such natural gas to interstate commerce to receive such natural gas if such natural gas were sold (or any successor in interest to such person).

(3) Right of first refusal.—The Commission shall, by rule, require that following—

(A) the expiration or termination of any contract with respect to the first sale of natural gas subject to the requirements of this subsection to the person who, but for the provisions of section 601[3431](a)(1)(B) of this title (relating to deregulation), would have been entitled pursuant to the commitment or dedication of such natural gas to interstate commerce to receive such natural gas if such natural gas were sold (or any successor in interest to such person), or

(B) any rejection of any bona fide offer, described in paragraph (2), to sell natural gas subject to the requirements of this subsection,

such person who would have been entitled to receive such natural gas shall be granted a right of first refusal of the first offer to sell such natural gas which, subject to the exercise of any right of first refusal under this paragraph, has been substantially accepted in principle by another person in an arms-length transaction.

(c) Filing of contracts and ancillary agreements.—The Commission may, by rule or order, require any first sale purchaser of natural gas under a new contract, a successor

to an existing contract, or a rollover contract to file with the Commission a copy of such contract, together with all ancillary agreements and any existing contract applicable to such natural gas.

Section 501, 15 U.S.C. 3411:

General rulemaking authority

(a) In general.—Except where expressly provided otherwise, the Commission shall administer this chapter. The Commission, or any other Federal officer or agency in which any function under this chapter is vested or delegated, is authorized to perform any and all acts (including any appropriate enforcement activity), and to prescribe, amend, and rescind such rules and orders as it may find necessary or appropriate to carry out its functions under this chapter.

(b) Authority to define terms.—Except where otherwise expressly provided, the Commission is authorized to define, by rule, accounting, technical, and trade terms used in this chapter. Any such definition shall be consistent with the definitions set forth in this chapter.

(c) Delegation of certain determinations.—The Commission may delegate to any State agency (with the consent of such agency) any of its functions with respect to sections 105[3315], 106[3316](b), and 109[3319](a)(1) and (3) of this title.

Section 503(a)-(d), 15 U.S.C. 3413(a)-(d):

Determinations for qualifying under certain categories of natural gas

(a) General rule.—

(1) Determination.—If any State or Federal agency makes any final determination which it is authorized

to make under subsection (c) of this section for purposes of—

(A) applying the definition of new natural gas under section 102[3312](c) of this title;

(B) deciding if certain natural gas produced from the Outer Continental Shelf qualifies under section 102[3312](d) of this title for the new natural gas ceiling price;

(C) applying the definition of new, onshore production well under section 103[3313](c) of this title;

(D) applying the definition of high-cost natural gas under section 107[3317](c) of this title; or

(E) applying the definition of stripper well natural gas under section 108[3318](b) of this title;

such determination shall be applicable under this chapter for such purposes unless such determination is reversed under the provisions of subsection (b) of this section or unless such State or Federal agency has waived its authority under the provisions of subsection (c) of this section.

(2) Notice to Commission.—Any Federal or State agency making a determination under paragraph (1) shall provide timely notice in writing of such determination to the Commission. Such notice shall include such substantiation and be in such a manner as the Commission may, by rule, require.

(b) Commission review.—

(1) Authority to review and reverse.—The Commission shall reverse any final State or Federal agency determination described in subsection (a) of this section if—

(A) it makes a finding that such determination is not supported by substantial evidence in the record upon which such determination was made; and

(B) such preliminary finding and notice thereof under paragraph (3) is made within 45 days after the date on which the Commission received notice of such determination under subsection (a)(2) of this section and the final such finding is made within 120 days after the date of the preliminary finding.

(2) Remand on basis of Commission information.—If—

(A) the Commission finds that a State or Federal agency determination is not consistent with information contained in the public records of the Commission, and which is not part of the record upon which such determination was made; and

(B) such preliminary finding and notice thereof under paragraph (3) is made within 45 days after the date on which the Commission received notice of such determination under subsection (a) (2) of this section and the final such finding is made within 120 days after the date of the preliminary finding.

it may remand the matter to such State or Federal agency for consideration of such information. If such agency, after consideration of the information transmitted to it by the Commission, affirms its previous determination, such determination, as so affirmed, shall be subject to review in accordance with this subsection (other than this paragraph).

(3) Notice.—The Commission shall provide notice of any proposed finding under this subsection to the

State or Federal agency which made such determination and those parties identified in the notice to the Commission of such determination.

(4) Judicial review of Commission actions.—

(A) Remands.—Any party identified in the notice to the Commission of a determination by a State or Federal agency may obtain review of any final decision by the Commission to remand under paragraph (2) in the United States Court of Appeals for any circuit in which such party is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia circuit. The reviewing court shall reverse any such decision if it finds such decision is arbitrary or capricious.

(B) Findings.—Any person aggrieved or adversely affected by a final finding of the Commission under paragraph (1) may within 60 days thereafter file a petition for review of such finding in the United States Court of Appeals for any circuit in which the party involved in such determination is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia circuit. The reviewing court shall reverse any such finding of the Commission if the State or Federal agency determination involved is supported by substantial evidence.

(c) State authority.—

(1) General rule.—A Federal or State agency having regulatory jurisdiction with respect to the production of natural gas is authorized to make determinations referred to in subsection (a) of this section.

(2) Waiver.—

(A) In general.—Any Federal or State agency may, in whole or in part, waive its authority to make determinations referred to in subsection (a)(1) of this section by entering into an agreement in accordance with subparagraph (B). If such agency executes such a waiver, the Commission shall, consistent with the agreement, make the determinations which would otherwise be made by such Federal or State agency until the earlier of—

(i) the expiration of the period specified in the agreement; or

(ii) the date such agency transmits to the Commission written notice that it terminates such waiver and assumes the authority to make determinations referred to in subsection (a)(1) of this section.

Any waiver, or termination of any waiver, shall not apply to any determination with respect to any petition therefor which is pending before such agency or the Commission (as the case may be) on the date on which such a waiver or revocation is made.

(B) Agreements.—Any waiver under subparagraph (A) may be made only by a written agreement between the Federal or State agency involved and the Commission. Any such agreement shall set forth the terms and conditions applicable to such waiver.

(3) Procedures applicable.—Determinations of a Federal or State agency referred to in subsection (a)(1) of this section shall be made in accordance with the procedures generally applicable to such agency for the making of such determinations or comparable determinations under the provisions of Federal or State

law, as the case may be, pursuant to which they exercise their regulatory jurisdiction. The Commission may prescribe the form and content of filings with a Federal or State agency in connection with determinations made under this section.

(4) Judicial review.—Any such determination referred to in subsection (a)(1) of this section made in accordance with procedures described in paragraph (3) shall not be subject to judicial review under any Federal or State law except as provided under subsection (b) of this section.

(d) Effect of determination.—For purposes of this chapter.—

(1) General rule.—Any final determination referred to in subsection (a)(1) of this section made by a Federal or State agency (or by the Commission under subsection (c)(2) of this section) which relates to any natural gas and which is no longer subject to review by the Commission under this section or to judicial review shall thereafter be binding with respect to such natural gas. The preceding sentence shall not apply to any final determination—

(A) if in making such determination the Commission or such Federal or State agency relied on any untrue statement of a material fact; or

(B) if there was omitted a statement of material fact necessary in order to make the statements made not misleading, in light of the circumstances under which they were made, to the Federal or State agency in making such final determination or to the Commission in reviewing such determination.

(2) Application of title 18.—Any untrue statement or omission of material fact to a Federal or State agency upon which the Commission relied shall be

deemed to be a statement or entry under section 1001 of Title 18.

Section 505(a), 15 U.S.C. 3435(a):

(a) Authority to intervene.—

(1) Intervention as matter of right.—The Secretary of Energy may intervene as a matter of right in any proceeding relating to the prorationing of, or other limitations upon, natural gas production which is conducted by any State agency having regulatory jurisdiction over the production of natural gas.

(2) Enforcement of right to intervene.—The Secretary may bring an action in any appropriate court of the United States to enforce his right to intervene under paragraph (1).

(3) Access to information.—As an intervenor in a proceeding described in subsection (a) of this section, the Secretary shall have access to information available to other parties to the proceeding if such information is relevant to the issues to which his participation in such proceeding relates. Such information may be obtained through reasonable rules relating to discovery of information prescribed by the State agency.

Section 601, 15 U.S.C. 3431:

Coordination with Natural Gas Act

(a) Jurisdiction of Commission under Natural Gas Act.—

(1) Sales.—

(A) Natural gas not committed or dedicated.—For purposes of section 1(b) of the Natural Gas Act, effective on the first day of the first month beginning after November 9, 1978, the provisions

of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to natural gas which was not committed or dedicated to interstate commerce as of November 8, 1978, solely by reason of any first sale of such natural gas.

(B) Committed or dedicated natural gas.—Effective beginning on the first day of the first month beginning after November 9, 1978, for purposes of section 1(b) of the Natural Gas Act, the provisions of such Act and the jurisdiction of the Commission under such Act shall not apply solely by reason of any first sale of natural gas which is committed or dedicated to interstate commerce as of November 8, 1978, and which is—

(i) high-cost natural gas (as defined in section 107[3317](c)(1), (2), (3), or (4) of this title);

(ii) new natural gas (as defined in section 102[3312](c) of this title); or

(iii) natural gas produced from any new, onshore production well (as defined in section 103 [3313](c) of this title).

(C) Authorized sales or assignments.—For purposes of section 1(b) of the Natural Gas Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply by reason of any sale of natural gas—

(i) authorized under section 302[3362](a) or 311[3371](b) of this title; or

(ii) pursuant to any assigned authorized under section 312[3372](a) of this title.

(D) Natural-gas company.—For purposes of the Natural Gas Act, the term "natural-gas company"

(as defined in section 2(6) of such Act) shall not include any person by reason of, or with respect to, any sale of natural gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission do not apply to such sale solely by reason of subparagraph (A), (B), or (C) of this paragraph.

(E) Alaskan natural gas.—Subparagraph (B) (ii) and (iii) shall not apply with respect to natural gas produced from the Prudhoe Bay unit of Alaska and transported through the transportation system approved under the Alaska Natural Gas Transportation Act of 1976.

(2) Transportation.—

(A) Jurisdiction of the Commission.—For purposes of section 1[717](b) of the Natural Gas Act the provisions of such Act and the jurisdiction of the Commission under such Act shall not apply to any transportation in interstate commerce of natural gas if such transportation is—

(i) pursuant to any order under section 302 [3362](c) or section 303[3363](b), (c), (d), or (h) of this title; or

(ii) authorized by the Commission under section 311[3371](a) of this title.

(B) Natural-gas company.—For purposes of the Natural Gas Act, the term "natural-gas company" (as defined in section 2[717a](6) of such Act) shall not include any person by reason of, or with respect to, any transportation of natural gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission under the Natural Gas Act do not apply to such transportation by reason of subparagraph (A) of this paragraph.

(b) Charges deemed just and reasonable.—

(1) Sales.—

(A) First Sales.—Subject to paragraph (4), for purposes of sections 4[717c] and 5[717d] of the Natural Gas Act, any amount paid in any first sale of natural gas shall be deemed to be just and reasonable if—

(i) such amount does not exceed the applicable maximum lawful price established under subchapter I of this chapter; or

(ii) there is no applicable maximum lawful price solely by reason of the elimination of price controls pursuant to part B of subchapter I of this chapter.

(B) Emergency sales.—For purposes of sections 4[717c] and 5[717d] of the Natural Gas Act, any amount paid in any sale authorized under section 302[3362](a) of this title shall be deemed to be just and reasonable if such amount does not exceed the fair and equitable price established under such section and applicable to such sale.

(C) Sales by intrastate pipelines.—For purposes of sections 4[717c] and 5[717d] of the Natural Gas Act, any amount paid in any sale authorized by the Commission under section 311[3371](b) of this title shall be deemed to be just and reasonable if such amount does not exceed the fair and equitable price established by the Commission and applicable to such sale.

(D) Assignments.—For purposes of sections 4 [717c] and 5[717d] of the Natural Gas Act, any amount paid pursuant to the terms of any contract with respect to that portion of which the Commission has authorized an assignment under

section 312[3372](a) of this title shall be deemed to be just and reasonable if such amount does not exceed the applicable maximum lawful price established under subchapter I of this chapter.

(E) Affiliated entities limitation.—For purposes of paragraph (1), in the case of any first sale between any interstate pipeline and any affiliate of such pipeline, any amount paid in any first sale shall be deemed to be just and reasonable if, in addition to satisfying the requirements of such paragraph, such amount does not exceed the amount paid in comparable first sales between persons not affiliated with such interstate pipeline.

(2) Other charges.—

(A) Allocation.—For purposes of sections 4 [717c] and 5[717d] of the Natural Gas Act, any amount paid by any interstate pipeline for transportation, storage, delivery or other services provided pursuant to any order under section 303 [3363](b), (c), or (d) of this title shall be deemed to be just and reasonable if such amount is prescribed by the President under Section 303 [3363] (h)(1) of this title.

(B) Transportation.—For purposes of sections 4[717c] and 5[717d] of the Natural Gas Act, any amount paid by any interstate pipeline for any transportation authorized by the Commission under section 311[3371](a) of this title shall be deemed to be just and reasonable if such amount does not exceed that approved by the Commission under such section.

(c) Guaranteed passthrough.—

(1) Certificate may not be denied based upon price.—The Commission may not deny, or condition the grant

of, any certificate under section 7[717f] of the Natural Gas Act based upon the amount paid in any sale of natural gas, if such amount is deemed to be just and reasonable under subsection (b) of this section.

(2) Recovery of just and reasonable prices paid.—For purposes of sections 4[717c] and 5[717d] of the Natural Gas Act, the Commission may not deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas if—

(A) under subsection (b) of this section, such amount is deemed to be just and reasonable for purposes of sections 4[717c] and 5[717d] of such Act, and

(B) such recovery is not inconsistent with any requirement of any rule under section 201[3341] of this title (including any amendment under section 202[3342] of this title),

except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds.

Section 602(a), 15 U.S.C. 3432(a):

Authority to prescribe lower minimum lawful prices.—Nothing in this chapter shall affect the authority of any State to establish or enforce any maximum lawful price for the first sale of natural gas produced in such State which does not exceed the applicable maximum lawful price, if any, under subchapter [Title] 1 of this chapter.